93-106

No. _____

Supreme Court, U.S.
FILED
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IN THE SUPREME COURT OF
THE UNITED STATES
October Term, 1993

AREA INTERSTATE TRUCKING, INC.
INDIANA MATERIAL TRANSFER, INC.
ADVANCE TRANSPORTATION COMPANY,
BRYAN TRUCK LINE, INC., CHURCHILL
TRUCK LINES, INC., FRANKS & SON, INC.,
GREAT AMERICAN LINES, INC., KAT, INC.
and MOGLE ENTERPRISES, INC. on behalf
of themselves and all others
similarly situated, Petitioners,

v.

INDIANA DEPARTMENT OF REVENUE and
KENNETH L. MILLER, as Acting
Commissioner of the Indiana
Department of Revenue, Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF INDIANA

PETITION FOR WRIT OF CERTIORARI

James H. Hanson*
Counsel of Record for Petitioners
Scopelitis, Garvin, Light & Hanson
10 West Market Street, Suite 1777
Indianapolis, IN 46204
(317) 637-1777

Michael J. Tosick
Lynne D. Lidke
Co-Counsel for Petitioners

July 13, 1992

* Application for admission pending

58 pp

QUESTION PRESENTED FOR REVIEW

Petitioners, Area Interstate Trucking, Inc., Indiana Material Transfer, Inc., Advance Transportation Company, Bryan Truck Line, Inc., Churchill Truck Lines, Inc., Franks & Son, Inc., Great American Lines, Inc., KAT, Inc., and Mogle Enterprises, Inc., on behalf of themselves and all others similarly situated, respectfully request that a Writ of Certiorari issue to review the following question previously presented to the Indiana Tax Court and the Supreme Court of Indiana:

> Are Petitioners' rights to equal protection and due process of law under the United States Constitution violated because the State of Indiana
>
> (a) Levies its Motor Carrier Fuel Tax[1] in proportion to the actual amount of vehicular use taxpayers make of the roadway system supported by the tax revenue collected and imposes tax only when taxpayers actually make vehicular use of that roadway system, but
>
> (b) Denies Petitioners the benefit of that proportionate taxation scheme and levies tax upon Petitioners' vehicular use of the Indiana Toll Road -- the only Indiana thoroughfare that is not part of the roadway system supported by the tax revenue collected?

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[1] "Motor Carrier Fuel Tax" is defined *infra* at 3, n.3.

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[2] John R. Gildea was originally named as a respondent in the lower court proceedings. By order of the Indiana Tax Court, Kenneth L. Miller, as Acting Commissioner of the Indiana Department of Revenue, was substituted for Mr. Gildea. In all other respects, the parties to this Petition and the parties in the lower court proceedings are identical. Pursuant to Sup. Ct. Rule 29.1, the designation of Petitioners' corporate relationships is as follows.

Petitioner, Churchill Truck Lines, Inc., is a subsidiary of Churchill Freight Systems, Inc., and its subsidiary (other than wholly-owned subsidiaries) is Churchill Redevelopment Corp.

Petitioner, KAT, Inc., which has no subsidiaries that are not wholly owned, is a subsidiary of ATC, Inc. of Indiana.

Petitioner, Great American Lines, Inc., which has no subsidiaries that are not wholly owned, is a subsidiary of AFA Enterprises, Inc.

Petitioner, Bryan Truck Lines, Inc., which has no subsidiaries that are not wholly owned, is a subsidiary of Bestway Motor Lines, Inc.

Petitioners, Area Interstate Trucking, Inc., Indiana Material Transfer, Inc., Advance Transportation Company, Franks & Son, Inc., and Mogle Enterprises, Inc., are independent corporations that have no subsidiaries that are not wholly owned.

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Department of Revenue, Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF INDIANA

PETITION FOR WRIT OF CERTIORARI

I.

OPINIONS BELOW

This Petition seeks a writ of certiorari with respect to an unpublished final Order of the Supreme Court of Indiana issued on April 14, 1993 and reprinted as Appendix A. *Appendix* at 1a. The Order denies Petitioners' request for review of the decision of

the Indiana Tax Court, reported at 605 N.E.2d 272 (1992) and reprinted as Appendix B. *Appendix* at 2a.

II.

JURISDICTION

The final Order of the Supreme Court of Indiana was entered on April 14, 1993, and, pursuant to Ind. Rules of Procedure, Appellate Rule 18(H)(1), no petition for rehearing is permitted upon the denial of a petition for review of an Indiana Tax Court decision. Accordingly, this Petition is timely filed within 90 days of the Supreme Court of Indiana's Order. The jurisdiction of this Court to review the Order on petition for certiorari rests upon 28 U.S.C. § 1257(a) (1992) because the Petition draws into question the validity of a state statute on the ground that it is repugnant to the United States Constitution.

III.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant constitutional provision in this case is Section 1 of the Fourteenth Amendment to the United States Constitution which provides, in pertinent part, as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1. The primary relevant statutory provision is Ind. Code Ann. § 6-6-4.1-4 (West Supp. 1992), which is reprinted verbatim in the Appendix and provides, in pertinent part, as follows:

> A tax is imposed on the consumption of motor fuel by a carrier in its operations on highways in Indiana.
>
> * * * *
>
> The tax imposed under this section does not apply to that portion of motor fuel used in Indiana to propel equipment mounted on a motor vehicle having a common reservoir for locomotion on the highway and the operation of such equipment, as determined by rule of the commissioner.

Ind. Code Ann. § 6-6-4.1-4(a)(d) (West Supp. 1992). *See also Appendix* at 18a. Other relevant statutory provisions are Ind. Code Ann. §§ 6-6-4.1-1; -2; -4.5; -5 (West Supp. 1992), which statutes are reprinted in the Appendix. *See Appendix* at 15a-16a; 19a-20a. Finally, official regulations adopted by Respondent, Indiana Department of Revenue (the "Department"), are also relevant to the Court's review, and those regulations, 45 I.A.C. 13-1-3; -1-11; -4-6 (1992), are reprinted in the Appendix at 21a-29a.

IV.

STATEMENT OF THE CASE

A.

Summary of the Facts

Under Indiana law, the Motor Carrier Fuel Tax[3] is imposed "on the consumption of motor fuel by a carrier in its operations on

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[3] The Motor Carrier Fuel Tax is actually a two-part tax imposed by separate statutes. The "base" charge is imposed by Ind. Code Ann. § 6-6-4.1-4(a) (West Supp. 1992) at the same rate per gallon as the special fuel tax rate under Ind. Code Ann. §§ 6-6-2.1, et seq. (West 1989 and Supp. 1992) (currently 16¢ per gallon). A surcharge is added by Ind. Code Ann. § 6-6-4.1-4.5(a) (West Supp. 1992) at the current rate of 11¢ per gallon. Throughout this Petition, the "base" charge and the surcharge are collectively referred to as the "Motor Carrier Fuel Tax."

highways in Indiana." Ind. Code Ann. §§ 6-6-4.1-4(a); -4.5(a) (West Supp. 1992) (emphasis supplied). "Carriers" subject to the Motor Carrier Fuel Tax are those persons who operate "commercial motor vehicles" as defined by Indiana statute. *See* Ind. Code Ann. §§ 6-6-4.1-1; -2 (West Supp. 1992). Petitioners, as motor carriers providing for-hire transportation services, operate trucks and tractor-trailer vehicles that qualify as "commercial motor vehicles," and, because their commercial motor vehicles consume fuel in operations upon Indiana highways, Petitioners are subject to and pay the Motor Carrier Fuel Tax to the Department.

All carriers with Indiana operations report and pay their Motor Carrier Fuel Tax liability to the Department on a quarterly basis. The amount of tax paid is specifically calculated based upon the amount of fuel consumed in vehicular operations upon Indiana "highways." Succinctly stated, carriers calculate a miles-per-gallon ratio based upon their overall operations, apply that ratio to the actual number of miles traveled on Indiana "highways," and arrive at taxable Indiana fuel use that is assessed at the rate of 27¢ per gallon. *See* Ind. Code Ann. §§ 6-6-4.1-4(b)(c); -4.5(b)(c) (West Supp. 1992). For example, if a carrier's vehicles, on average, consume fuel at the rate of four miles per gallon, the Motor Carrier Fuel Tax paid upon 1,000 Indiana "highway" miles is calculated as follows: (1,000 ÷ 4) 27¢ = $67.50.

Motor Carrier Fuel Tax monies, when collected by the Department, are deposited in varying amounts into three different accounts -- the Indiana State Highway Fund, the Indiana Motor Vehicle Highway Account, and the Indiana Motor Carrier Regulation Fund. Ind. Code Ann. § 6-6-4.1-5 (West Supp. 1992). As such, out of the 27¢ per gallon of Motor Carrier Fuel Tax collected by the Department, over 26¢ is distributed to state and local agencies throughout Indiana for use in "highway" construction, repair, maintenance, and safety. The Indiana Toll Road, however, does not garner any funds, income, or revenue from the three different funds into which Motor Carrier Fuel Tax revenue is deposited. Rather, the Indiana Toll Road is administered separately from all other public thoroughfares in the state and is supported solely through the collection of tolls and revenue generated by various commercial endeavors.

As previously noted, Petitioners operate commercial motor vehicles within the State of Indiana and thus pay Motor Carrier Fuel Tax to the Department based upon the number of "highway" miles they operate within the state. What poses the issue in this case is the fact that portions of Petitioners' operations involve vehicular use of the Indiana Toll Road, and the Department requires Petitioners to include, within their Indiana "highway" miles calculation, the miles traveled by their commercial motor vehicles on the Indiana Toll Road. *See* 45 I.A.C 13-1-11(b) (1992).

Accordingly, in addition to the tolls they pay for use of the Indiana Toll Road, Petitioners have also been required to pay Motor Carrier Fuel Tax on their toll road fuel consumption,[4] despite the fact that the Indiana Toll Road is not part of the roadway system supported by the tax revenue collected. Historically, however, other Motor Carrier Fuel Tax taxpayers have not been taxed on fuel consumption that is not associated with vehicular use of the roadway system supported by the tax.

First, by statutory definition, only use of fuel in Indiana is a taxable event. Thus, when taxpayers operate their vehicles on highways outside Indiana, they are not subject to the Motor Carrier Fuel Tax.

Second, in 1984, the Department enacted regulations specifying that commercial motor vehicles "operated on private property and not engaged in highway transportation" are not motor vehicles the operation of which are subject to the Motor Carrier Fuel Tax. *See* 45 I.A.C. 13-1-3(f); -3(g) (1992). Thus, the Department, in exercising its administrative powers, does not impose Motor Carrier Fuel Tax upon fuel consumed by vehicles moving on private roadways and other private lands.

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[4] One Petitioner, Area Interstate Trucking, Inc., calculates that it paid approximately $186,919.28 in Motor Carrier Fuel Tax on fuel consumed on the Indiana Toll Road during the years 1987 through 1990.

Third, beginning in 1985, the Indiana legislature began recognizing that fuel consumed by what is commonly referred to as "auxiliary power equipment" mounted upon commercial motor vehicles is not subject to tax.[5] After a series of legislative amendments, Ind. Code Ann. § 6-6-4.1-4(d) (West Supp. 1992), in its final form, codified the exemption for auxiliary power equipment as follows:

> The tax imposed under this section does not apply to that portion of motor fuel used in Indiana to propel equipment mounted on a motor vehicle having a common fuel reservoir for locomotion on the highway and the operation of such equipment, as determined by rule of the commissioner.

See also Ind. Code Ann. § 6-6-4.1-4.5(d) (West Supp. 1992). Notably, several types of commercial motor vehicles otherwise subject to the Motor Carrier Fuel Tax, including ready-mix concrete trucks, solid waste garbage trucks, and refrigeration trucks, operate auxiliary power equipment at the same time the vehicle is moving along the highway. Nevertheless, pursuant to regulation, 45 I.A.C. 13-4-7 (1992), the Department recognizes that certain specified amounts of fuel consumed by such auxiliary power equipment are not taxable, even when the auxiliary power equipment is operated upon the highway.

Believing they were entitled to the same type of exemption afforded to carriers that operate on highways outside the state, carriers that travel upon private property, and carriers that operate auxiliary power equipment, Petitioners filed with the Department claims for refund of Motor Carrier Fuel Tax paid on fuel consumed in Indiana Toll Road operations over the course of several tax years. Those claims for refund, however, were never timely acted upon by the Department, and, as a result, the claims were deemed administratively denied and an appeal to the Indiana Tax

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[5] Examples of such equipment include the mechanism that turns the mixing drum on a ready-mix concrete truck and the apparatus that raises and lowers the bed of a dump truck.

Court was permitted by Ind. Code Ann. § 33-3-5-2 (West Supp. 1992).

B.

The State Court Proceedings

Petitioners, on July 22, 1991, filed with the Indiana Tax Court their Amended Verified Petition to Enjoin Collection of Tax and Original Tax Appeal ("Amended Verified Petition"), seeking tax refunds, injunctive relief, and declaratory relief and asserting that the assessment and collection of the Motor Carrier Fuel Tax upon fuel consumed in vehicular operations on the Indiana Toll Road is unlawful.[6] Among other things, the Amended Verified Petition specifically alleged that

> Ind. Code § 6-6-4.1, et seq., as applied to Petitioners, is unconstitutional in that such application violates the due process and equal protection clauses of the U.S. Constitution and the Indiana Constitution.

In addition, by way of their Motion for Summary Judgment on Petitioners' "Equal Protection" Claim, Petitioners requested the Indiana Tax Court to issue

> a declaration on summary judgment that the Motor Carrier Fuel Tax statutes set forth at Ind. Code §§ 6-6-4.1, et seq., as applied to Petitioners' consumption of fuel used on the Indiana Toll Road, violate the equal protection and due process clauses of the U.S. and Indiana Constitutions.

After full briefing, the Indiana Tax Court, by its published opinion dated December 29, 1992, overruled and denied Petitioners' request for summary judgment and granted Respondents'

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[6] Petitioners also sought certification of their case as a class action. By agreement of the parties, the request for class action certification was delayed pending rulings on cross-motions for partial summary judgment.

cross-motion for summary judgment, concluding that the Motor Carrier Fuel Tax, as applied to the consumption of fuel in operations on the Indiana Toll Road, does not offend the U.S. Constitution. In so doing, the Indiana Tax Court ruled that the purpose of the Motor Carrier Fuel Tax is "simply to charge motor carriers for the use of the public roads in Indiana." Also, without clearly setting forth the distinctions drawn, the Indiana Tax Court summarily concluded that there were "plain" distinctions between Petitioners' consumption of fuel upon the Indiana Toll Road and the consumption of fuel by other taxpayers in their out-of-state operations, their vehicular use of private roads, and their operation of auxiliary power equipment. *Area Interstate Trucking, Inc. v. Indiana Department of Revenue*, Ind. Tax Court, 605 N.E.2d 272, 277 (1992).

Pursuant to Ind. Code Ann. § 33-3-5-15 (West Supp. 1992) and Ind. Rules of Procedure, Appellate Rule 18(C), Petitioners next turned to the Supreme Court of Indiana, filing their Petition for Review on February 22, 1993. The Petition for Review specifically alleged that the Indiana Tax Court opinion

> erroneously decides a new question of law in Indiana in its conclusion that the assessment of the [Motor Carrier Fuel Tax] upon fuel consumed in operations on the Indiana Toll Road does not offend equal protection and due process principles.

The Supreme Court of Indiana refused to review the Indiana Tax Court's opinion and without submitting a written decision affirmed the Indiana Tax Court decision in its entirety by Order dated April 14, 1993.

V.

REASONS FOR GRANTING THE WRIT

This Petition calls upon the Court to revisit its 1936 decision in *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1936). *Carmichael*, when certain of its language in text is

juxtaposed against other comments set forth in a footnote, profiles the tension between the latitude afforded states in their exercise of taxation powers and the rights of taxpayers to equal protection of the law. In its text, *Carmichael* observes that

> [n]othing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied.
>
> A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes.
>
> * * * *
>
> This Court has repudiated the suggestion, whenever made, that the Constitution requires the benefits derived from the expenditure of public monies to be apportioned to the burdens of the taxpayer, or that he can resist the payment of the tax because it is not expended for purposes which are peculiarly beneficial to him.

Id. at 521-23 (footnote omitted). To that plain and well-stated commentary, however, *Carmichael* adds the following proviso in a footnote:

> A different question is presented when a state undertakes to levy local assessments apportioned to local benefits. In that case, if it fails to conform to the standard of apportionment adopted, its action is arbitrary, because there is a denial of equal protection.

Id. at 523 (citations omitted; emphasis supplied). In Petitioners' view, the issue presented in this case fits the *Carmichael* profile exactly: Although the State of Indiana was not compelled by any

constitutional requirement to tax fuel consumption in direct relation to the benefits taxpayers enjoy -- use of the roadways -- and the corresponding burdens they impose upon the state -- maintenance of the roadways used -- it did in fact enact such a "proportionate" taxation system. As such, the Motor Carrier Fuel Tax, as applied to all taxpayers except Petitioners, does in fact "levy local assessments apportioned to local benefits," and Respondents' failure to apply that system of taxation consistently to Petitioners denies them equal protection of the law. Thus, one of the compelling reasons for review by this Court is that the decisions of the lower courts do not acknowledge the impact of *Carmichael* and conflict with *Carmichael's* principles.

In addition to the noted conflict with *Carmichael*, the Petition presents a second compelling reason for review in that an important new federal question should be decided by this Court. Specifically, as modern-day systems of taxation become more finely tuned and sophisticated in their application, to what extent should an equal protection analysis inquire into the methods a state employs to tax activities within its borders, consider the practical impact of the taxation scheme employed, and evaluate the apparent legislative purposes behind the method of taxation chosen? In this case, the Indiana Tax Court, with broad, sweeping language, summarily disposed of Petitioners' contentions based upon its view that the Motor Carrier Fuel Tax is simply a tax "for the use of the public roads in Indiana." *Area Interstate Trucking, supra* at 277. What the Indiana Tax Court overlooks, however, is the impact of such a legislative classification in the context of a precise and specific taxation scheme that, for all taxpayers except Petitioners, levies tax in direct proportion to the burdens and benefits associated with the activity taxed. Petitioners may well make "use of the public roads in Indiana" when their vehicles travel upon the Indiana Toll Road, but the real and practical effect of that talismanic classification is that Petitioners are the only Motor Carrier Fuel Tax taxpayers denied the benefits of a proportionate taxation scheme that compels payment of tax only when the public roads so used are supported by the tax collected. Review of such discrimination against Petitioners thus affords the Court an opportunity to acknowledge that, as a taxation system becomes more specific in its purpose and more precise in carrying out that purpose, the more

finely-tuned the legislative classifications employed must be in order to withstand an equal protection challenge.

A.

The Lower Court Rulings Conflict With *Carmichael*

Carmichael properly points out that, in the context of an equal protection challenge,[7] no state is constitutionally compelled to impose tax only upon those who derive direct benefit from the tax's expenditure and who are responsible for the condition to be remedied by the tax. Indeed, states have been historically permitted, for example, to earmark cigarette and tobacco taxes for educational purposes or to impose liquor license fees for the purpose of funding noteworthy state projects designed to benefit the public generally. *See Carmichael, supra* at 521. Nevertheless, *Carmichael* also makes plain the basic proposition central to Petitioners' case: Once a state does undertake the task of proportionate taxation, it must apply the standard of apportionment even-handedly and in a fashion consistent with the Equal Protection Clause of the Fourteenth Amendment. In this case, the lower courts failed to recognize that, under *Carmichael*, the Motor Carrier Fuel Tax, as applied to Petitioners' operations on the Indiana Toll Road, does in fact fail to conform to the standard of apportionment adopted by the State of Indiana and, as such, denies Petitioners equal protection.

As previously noted, the Motor Carrier Fuel Tax is assessed in direct relation to the actual amount of vehicular use a taxpayer makes of the roadways traveled in Indiana because the taxpayer's

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[7] Petitioners assert both an equal protection and a substantive due process challenge to the Motor Carrier Fuel Tax as applied to their operations upon the Indiana Toll Road. However, their due process argument is for all purposes subsumed in the equal protection challenge. *See, e.g., Minnesota v. Cloverleaf Creamery Co.*, 449 U.S. 456, 470 n.12 (1981), *reh'g denied*, 450 U.S. 1027. Accordingly, throughout the balance of this Petition, an equal protection analysis will be employed.

fuel use is calculated based upon the number of miles the taxpayer's vehicles travel "on highways in Indiana." Ind. Code Ann. §§ 6-6-4.1-4(b); -4.5(b) (West Supp. 1992). Taxpayers calculate a miles-per-gallon ratio based upon their overall vehicular operations, apply that ratio to the actual number of miles traveled on Indiana "highways," and arrive at taxable Indiana fuel use that is assessed at the rate of 27¢ per gallon. The amount of tax the taxpayer pays, therefore, is directly and specifically proportionate to the use it makes of Indiana "highways." If a taxpayer's mileage on Indiana "highways" increases, the gross amount of tax paid also increases and in direct relation to the increase in "highway" mileage. Similarly, if mileage on Indiana "highways" decreases, the taxpayer's gross tax liability decreases in a directly-related amount. In short, the taxation scheme specifically measures vehicular use of "highways" and levies tax directly commensurate with that use.

Consistent with the format of the taxation scheme, Motor Carrier Fuel Tax monies are not used for general revenue purposes. Rather, the vast majority of the Motor Carrier Fuel Tax revenue collected is distributed to state and local agencies throughout Indiana for use in "highway" construction, maintenance, repair, and safety, and every public road in Indiana (except the Indiana Toll Road) is eligible to receive Motor Carrier Fuel Tax revenue for those purposes. The legislative intent that inspired enactment of the Motor Carrier Fuel Tax statutes could therefore not be more plain. The clear objective of the legislation is to impose a "use tax," or, even more specifically, a "consumption tax," whereby certain persons -- truckers -- who "consume" or use the facilities of the state pay for that use through a tax assessment that is levied in direct proportion to the actual amount of their "consumptive" activity.[8]

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[8] Indeed, the preamble to the original legislative scheme declared that it was "AN ACT to impose an additional fuel use tax on certain vehicles using Indiana's highways." 1969 Ind. Acts, Ch. 417, *repealed and recodified by* 1982 Ind. Acts, Pub. L. No. 59.

Importantly, Respondents do not require certain taxpayers to pay tax on fuel uses that are not associated with vehicular "consumption" of the roadways supported by the tax. The operation of a vehicle outside Indiana is not "consumptive" activity that burdens Indiana roadways and is therefore not taxable activity. Similarly, vehicular operations upon private roadways do not "consume" state-maintained facilities and, thus, pursuant to Department regulation, are not subject to the Motor Carrier Fuel Tax. 45 I.A.C. 13-1-3(f); -3(g) (1992). Furthermore, certain amounts of fuel deemed used in the operation of auxiliary power equipment are not subject to the tax, even though such fuel use may well take place during what is the statutory taxable event -- a taxpayer's "consumption of motor fuel ... in its operations on highways in Indiana." Ind. Code Ann. §§ 6-6-4.1-4(a); -4.5(a) (West Supp. 1992). *See* Ind. Code Ann. §§ 6-6-4.1-4(d); -4.5(d) (West Supp. 1992); 45 I.A.C. 13-4-7 (1992). But it is the locomotive operation of the vehicle upon which auxiliary power equipment is mounted -- not the operation of the auxiliary power equipment itself -- that "consumes" the roadways Indiana state and local government must maintain. Accordingly, Petitioners do not in any way question any of the exemptions afforded to other taxpayers -- those exemptions are logical and rationally-related to the structure and purpose of the proportionate Motor Carrier Fuel Tax system. But Petitioners do insist that they be treated equally and afforded the same benefits of a taxation scheme that compels payment of tax only when roadways supported by the tax are "consumed" and thereby burdened by their operations.

It is readily apparent that imposition of the Motor Carrier Fuel Tax upon Petitioners' Indiana Toll Road fuel consumption "fails to conform with the standard of apportionment adopted by the legislature," 301 U.S. at 524 n.15, and that the Indiana Tax Court therefore misapplied *Carmichael*. On the one hand, taxpayers who operate their vehicles outside the state, private property operators, and those who use auxiliary power equipment are all permitted "apportioned" taxation because the bases for the taxes they pay are the benefits they enjoy -- use of the roadways -- and the corresponding burdens they impose upon the State of Indiana -- maintenance of the roadways used. On the other hand, Petitioners are not permitted to pay tax in direct relation to either the benefits

they enjoy -- use of the roadways -- or the burdens they impose upon the state -- maintenance of the roadways used. Instead, when Petitioners pay Motor Carrier Fuel Tax upon their Indiana Toll Road fuel consumption, they pay to support every road other than the one they are using because not one penny of the Motor Carrier Fuel Tax they pay supports the Indiana Toll Road. Under *Carmichael*, such departure from the apportioned taxation scheme established by the Indiana legislature and applied by the Department is plainly arbitrary, illegal, and a denial of Petitioners' rights to equal protection of the law.

B.

The Lower Court Rulings Fail To Afford Petitioners' Claims The Level Of Scrutiny Demanded

Aside from the *Carmichael* analysis, there exists an additional important reason for this Court to address the issues raised by Petitioners' request for certiorari. Specifically, as discussed below, Petitioners contend that the rational-basis scrutiny applicable to equal protection challenges in modern-day tax cases demands a more thoughtful review than that employed by the Indiana courts in this case. Therefore, certiorari affords this Court a meaningful opportunity to consider how and to what extent rational-basis scrutiny should evolve in its application as states like Indiana undertake taxation programs that become increasingly more sophisticated in their approach, more precise in their purpose and design, and, necessarily, more susceptible to misunderstanding and misapplication.

Traditionally, this Court's precedent has afforded states "very wide discretion in the laying of their taxes" in the face of equal protection challenges. *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 526 (1959). As an often-quoted analysis observes,

> [T]he States have the attribute of sovereign powers in devising their fiscal systems to insure revenue and foster their local interests. Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable systems of state taxation. The State ... is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value.
>
> * * * *
>
> The rule has often been stated to be that the classification "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation."
>
> * * * *
>
> Similarly, it has long been settled that a classification, though discriminatory, is not arbitrary nor violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it.

Id. at 526-28 (emphasis supplied; citations omitted) (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). Petitioners acknowledge that "precise, scientific uniformity" is not a basic requirement imposed upon states as they undertake efforts at taxation. However, Petitioners do maintain that, as states choose to develop modern-day taxation systems that become more precise in their purposes and more scientific in carrying out those purposes, the legislative classifications employed must be more finely-tuned, and the rationale for the classifications used must be as carefully-drawn as the classifications themselves. In short, a complex taxation scheme cannot be adequately measured by a simplistic rationale.

This is not to say that the rational-basis scrutiny afforded to state taxation systems should be abandoned. Rational-basis scrutiny legitimately affords legislative classifications "some play in the joints," *Williams v. Vermont*, 472 U.S. 14, 23 n.8 (1985), because the right to tax is basic to the states' exercise of their sovereign powers. But the Equal Protection Clause similarly affords a basic right to citizen taxpayers, and, as such, rational-basis scrutiny should operate in a flexible, "sliding-scale" approach that affords jurists the ability to examine more carefully the real and practical effects of taxation schemes as they become more precise in their application and more definite in their legislative purpose. The development of modern-day taxation systems demands such an approach, as demonstrated by the proceedings in this case below.

There can be no question that, as the Indiana Tax Court concluded, Indiana has a legitimate right to levy a tax for use of its public roads. However, in this case, the proxy chosen to measure a taxpayer's use of the public roads is not a general, broad-based event or activity. The Motor Carrier Fuel Tax is not a flat tax or toll, such as that charged upon entering or exiting a specific roadway, and it is not a tax charged upon the purchase of fuel at service stations. Rather, the Motor Carrier Fuel Tax captures precisely the exact activity it seeks to tax -- "consumption" of roadways burdened by the activities of the taxpayers -- and the proxy employed to measure the taxpayer's use of those roadways is directly proportionate to the amount of the taxpayer's burdensome activity. Furthermore, the real and practical impact of the Motor Carrier Fuel Tax, as applied by Respondents, is that all taxpayers other than Petitioners must pay tax only when and to the actual extent they "consume" roadways supported by the tax.

Yet, perhaps constrained by its view that the Motor Carrier Fuel Tax must be sustained "if any state of facts reasonably can be conceived that would sustain it," *Allied Stores of Ohio, supra* at 528, the Indiana Tax Court disregarded entirely the real impact of the Motor Carrier Fuel Tax as applied to Petitioners. According to the Indiana Tax Court, "the incident of taxation chosen by the legislature is not limited to fuel consumed on roads supported by the Motor Carrier Fuel Tax." 605 N.E.2d at 277. But, the real

"incident of taxation" is in fact use of roadways supported by the tax because only Petitioners -- as carriers that operate upon a separately administered toll road system -- are denied the ability to pay tax only in direct proportion to their use of roadways supported by that tax. Simply put, the Indiana Tax Court measured the validity of a precisely-calibrated taxation scheme through use of a clumsy yardstick, and, in so doing, failed entirely to discern its nuances.

Under such circumstances, the Indiana Tax Court's application of rational-basis scrutiny clouded its vision and led it to erroneously conclude that the distinction between Petitioners and other taxpayers afforded Motor Carrier Fuel Tax exemptions is "plain enough." *Id.* In practical effect, Petitioners are identical to taxpayers who operate their vehicles outside the state and those who operate on private roads and thereby do not "consume" the roadways supported by the Motor Carrier Fuel Tax. Moreover, Petitioners are also identical to taxpayers who operate auxiliary power equipment while traveling upon roadways supported by the tax because neither toll road fuel consumption nor auxiliary power equipment operation -- even when it takes place on the highways -- "consumes" facilities of the state that will be paid for through collection of the Motor Carrier Fuel Tax. In reality, therefore, there are no distinctions, "plain" or not, that rationally differentiate Petitioners from other taxpayers afforded Motor Carrier Fuel Tax exemptions.

Because of the complexity of the Motor Carrier Fuel Tax, rational-basis scrutiny demands closer review than that employed by the Indiana Tax Court. It requires an acknowledgment that the more sophisticated a taxation system becomes, the more subject it is to misapplication in its impact and effect. It demands more careful review of the means by which a state seeks to tax activities within its borders and a more thoughtful analysis of the legislative purpose behind enactment and application of the taxation scheme. Rational-basis scrutiny need not be abandoned, but neither should it be blindly or unthinkingly applied; rather, it must evolve in such a way as to acknowledge modern-day systems of taxation and the true effect of those systems.

Such an approach is supported by precedent. In *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1977), this Court observed that "[t]he way in which a tax levied on participants in interstate commerce is measured and assessed bears directly on whether it implicates central Commerce Clause values." *Id.* at 282 (emphasis supplied). That view led the Court to reject the theoretical underpinnings of Commerce Clause cases that had previously upheld facially-neutral flat taxes imposed upon interstate motor carriers. Premised upon the notion that only the "privilege" to use state highways was being taxed, the cases repudiated in *Scheiner* could no longer be employed as justification for flat taxes that, as demonstrated by the evidence, charged all carriers the same fee "for a privilege that is several times more valuable to a local business than to its out-of-state competitors." *Id.* at 296. The same natural evolution of theory should be applied in the equal protection context as courts are presented with evidence of the impact of finely-calibrated taxation systems.

Like the abandoned "privilege" analysis previously employed in the Commerce Clause context, the Indiana Tax Court's talismanic "use of the public roads in Indiana" approach in this case obscures the actual effect of the Motor Carrier Fuel Tax. While Petitioners may well make "use of the public roads in Indiana" when they operate their motor vehicles along the Indiana Toll Road, they are at the same time the only taxpayers required to pay tax for vehicular use of public roads not supported by the tax collected. That is the real and practical impact of the Motor Carrier Fuel Tax, as applied to Petitioners, and that is the impact that rational-basis scrutiny should permit courts to acknowledge. In other contexts, this Court has looked to the "practical operation" of a legislative classification in the face of equal protection claims. *See United States Department of Agriculture v. Moreno*, 413 U.S. 528, 537 (1973). Complex tax systems demand the same type of scrutiny.

There is also precedent for a more careful analysis of the purpose of state taxation schemes than that employed by the Indiana Tax Court in this case. Specifically, in *Williams, supra*, this Court struck down a Vermont use tax scheme that afforded vehicle registrants a credit for tax paid to another state when the

vehicle was purchased out of state, but only if the registrant of the vehicle was a Vermont resident at the time the out-of-state tax was paid. In so doing, the Court carefully examined the statutory purpose of Vermont's sales and use tax scheme for vehicles, noting that the proceeds of the tax flowed to a transportation fund rather than to general revenue and concluding that the distinguishing feature between taxpayers entitled to the credit and those not entitled to the credit -- residence -- was a wholly arbitrary basis upon which to distinguish between Vermont taxpayers. As the Court viewed it,

> [h]aving registered a car in Vermont [the taxpayers who paid out-of-state taxes] are similarly situated for all relevant purposes. Each is a Vermont resident, using a car in Vermont, with an equal obligation to pay for the maintenance and improvement of Vermont's roads. The purposes of this statute would be identically served, and with an identical burden, by taxing each. The distinction between them bears no relation to the statutory purpose.

Id. at 23-24. Furthermore, as the Court noted, it made no sense to require some but not other taxpayers to pay for the roads they used, based upon the arbitrary distinction of residency:

> [T]he only plausible justification for imposing the tax on [the non-residents] in the first place -- apart from the simple desire to raise funds -- is the principle that those using the roads should pay for them. ... Yet this does not explain the exemption for a resident who bought a car elsewhere and paid a tax to another State ... . This "basic policy" arguably supports imposition of the use tax on [non-residents] and the denial of a credit to them; but it provides no rational reason to spare Vermont residents an equal burden.

Id. at 25-26 (emphasis supplied).

Residency -- the arbitrary and irrational legislative classification employed in *Williams* -- is far more easily recognizable as violative of equal protection principles than the legislative classifi-

cation that forms the basis for Petitioners' complaint in this case. Nevertheless, *Williams* demonstrates that, even under rational-basis scrutiny, courts can and should look beyond what only purports on the surface to be a "rational" basis for legislative classifications. Applied to this case, such an analysis would thrust aside "use of the public roads in Indiana" as a justification for application of the Motor Carrier Fuel Tax to Petitioners' Indiana Toll Road fuel consumption. Rather, such an analysis would recognize that the purpose of the Motor Carrier Fuel Tax is to collect from taxpayers their proportionate share of the cost of maintaining the roads upon which they travel. Such an analysis would also recognize that there is no justification for taxation of Petitioners' Indiana Toll Road fuel consumption when, for all other taxpayers, the only "use of the public roads in Indiana" taxed by Respondents is use of the public roadways that are in fact supported by the tax collected.

In short, this Court should grant the writ of certiorari to make plain that rational-basis scrutiny does not permit the Indiana courts to ignore the real difference between carriers subject to the Motor Carrier Fuel Tax and those that are not. In Indiana, the legislature and the Department have assured that all taxpayers (except Petitioners) pay the same 27¢ per gallon of fuel consumed in vehicular operations on the roadway system supported by the Motor Carrier Fuel Tax. Rational-basis scrutiny compels more than a mere talismanic invocation of equal protection principles in the face of such a finely-calibrated "consumption" tax that subjects all taxpayers other than Petitioners to tax only when and to the actual extent they use roadways supported by the tax. The practical operation of the Motor Carrier Fuel Tax, as applied to Petitioners, is not a mere happenstance or a fortuitous distinction that can survive rational-basis scrutiny. It is a real and arbitrary legislative classification that violates Petitioners' right to equal protection of the laws, and Petitioners respectfully request the Court for a writ of certiorari that accurately evaluates those equal protection concerns.

VI.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

James H. Hanson
Counsel of Record for Petitioners
Scopelitis, Garvin, Light & Hanson
10 West Market Street, Suite 1777
Indianapolis, IN 46204
(317) 637-1777

Michael J. Tosick
Lynne D. Lidke
Co-Counsel for Petitioners

July 13, 1993

APPENDICES

APPENDIX A

STATE OF INDIANA
Clerk of the Supreme Court,
Court of Appeals and Tax Court
Dwayne M. Brown, Clerk
217 State House
Telephone 317-232-1930

INDIANAPOLIS, 46204

JAMES HAROLD HANSON
1777 MARKET TOWER
10 WEST MARKET STREET
INDIANAPOLIS, IN 46204-2971

Cause Number
49T10-9105-TA-00022
LOWER CAUSE
N/A

AREA INTERSTATE TRUCKING, INC. ET AL -V-
INDIANA DEPT. OF REVENUE

You are hereby notified that the Supreme Court has on this day 4/14/93 PETITIONER'S PETITION FOR REVIEW IS HEREBY DENIED. RANDALL T. SHEPARD, CHIEF JUSTICE. ALL JUSTICES CONCUR.
AA

WITNESS my name and the seal of said Court, this 14TH day of APRIL, 1993

/s/Dwayne Brown
Clerk Supreme Court, Court of Appeals
and Tax Court

APPENDIX B

IN THE
INDIANA TAX COURT

AREA INTERSTATE TRUCKING, INC., INDIANA MATERIAL TRANSFER, INC., ADVANCE TRANSPORTATION COMPANY, BRYAN TRUCK LINE, INC., CHURCHILL TRUCK LINES, INC., FRANKS & SON, INC., GREAT AMERICAN LINES, INC., KAT, INC., and MOGLE ENTERPRISES, INC.,	)	
Petitioners,	)	
v.	)	Case No. 49T10-9105-TA-00022
INDIANA DEPARTMENT OF REVENUE and JOHN R. GILDEA, as Commissioner of the Indiana Department of Revenue,	)	
Respondents.	)	

APPEAL FROM A FINAL DETERMINATION
OF THE INDIANA DEPARTMENT OF REVENUE

FISHER, J.

The Petitioners, Area Interstate Trucking, Inc., Indiana Material Transfer, Inc., Advance Transportation Company, Bryan Truck Line, Inc., Churchill Truck Lines, Inc., Franks & Son, Inc., Great American Lines, Inc., KAT, Inc., and Mogle Enterprises, Inc., appeal the imposition of the tax and surtax (collective-

ly motor carrier fuel tax) under IND. CODE 6-6-4.1. This matter is before the Court on the Petitioners' motions for summary judgment and the Respondents' cross motion for summary judgment. The Petitioners seek injunctive relief pursuant to count one of their petition for injunction and original tax appeal.

FACTS

The parties stipulated the following pertinent facts:

A. Petitioners operate motor vehicle equipment that qualifies as 'commercial motor vehicles' subject to the motor carrier fuel tax, and[] because those commercial motor vehicles consume fuel in their operation upon Indiana highways, Petitioners are subject to and pay the motor carrier fuel tax to Respondent, the Indiana Department of Revenue ('Department').

B. The commercial motor vehicles operated by Petitioners operate, in part, along the Indiana toll Road.

C. Petitioners calculate, report, and pay their motor carrier fuel tax liability on a quarterly basis. In so doing, Petitioners are required to calculate the amount of taxable fuel based on the mileage their commercial motor vehicles operate upon Indiana 'highways.'

D. The Department requires Petitioners to include within their calculation of 'highway' miles those miles operated by Petitioners' commercial motor vehicles on the Indiana toll road. Thus, Petitioners have been required to pay motor carrier fuel tax upon fuel consumed on the Indiana toll road and have in fact paid such tax . . . .

Stipulation for Summary Judgment Purposes, Exhibit A.

ISSUES

The parties' cross motions for summary judgment raise the following issues:

I. Whether the Indiana toll road is a "highway" as defined under IND. CODE 6-6-4.1-1(f) for purposes of the motor carrier fuel tax?[1]

II. Whether imposition of the motor carrier fuel tax upon fuel consumed in operating on the Indiana toll road is constitutional?[2]

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[1] IC 6-6-4.1-1(e) prior to January 1, 1990.

[2] Additionally, the Respondents contend issue preclusion prevents the Petitioners from asserting their claims in the case at bar. The court notes that issue preclusion applies only "where the party seeking estoppel can show: 1) a final judgment on the merits in a court of competent jurisdiction; 2) identity of the issues; and 3) the party to be estopped was a party or the privy of a party in the prior action." Tofany v. NBS Imaging Sys., Inc. (1992), Ind.App., 597 N.E.2d 23, 26-27 (quoting White v. Allstate Ins. Co. (1992), Ind.App., 591 N.E.2d 586, 589, 592). In Area Interstate Trucking, Inc. v. Indiana Department of State Revenue (1991), Ind.App., 574 N.E.2d 311, trans. denied, some, but not all of the Petitioners attempted to intervene in a class action of motor carriers consuming fuel in operating auxiliary equpment. These Petitioners sought recognition as a subclass of operators that consumes motor fuel on the Indiana toll road. In determining those Petitioners were not entitled to intervene, the court of appeals addressed whether the Indiana toll road is a "highway" for purposes of the motor carrier fuel tax. The court of appeals did not, however, expressly resolve the constitutional issues raised in the case at bar.

In addition, "[i]ssue preclusion [will] not bar the relitigation of an issue unless it was shown that the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue previously." City of Gary v. Allstate Ins. Co. (1992), Ind.App., 598 N.E.2d 625, 626 (citing White, 591 N.E.2d at 590. "To estop a party who has not been afforded a chance to present evidence and arguments on an issue would offend principles of due process." Id. (citing Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation (1971), 402 U.S. 313, 329, 91 S.Ct. 1434, 1443, 28 L.Ed.2d 788, 800).

STANDARD OF REVIEW

Summary judgment may be granted if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C). "Cross motions for summary judgment do not alter the standard for granting summary judgment." Caylor-Nickel Clinic, P.C. v. Indiana Dep't of State Revenue (1991), Ind. Tax, 569 N.E.2d 765, 766, aff'd, (1992), Ind., 587 N.E.2d 1311. As the parties agree, there are no genuine issues of material fact that prevent the court from deciding whether judgment may be granted as a matter of law.

DISCUSSION & DECISION

I.

Indiana imposes a motor carrier fuel tax "on the consumption of motor fuel by a carrier in its operations on highways in Indiana." IND. CODE 6-6-4.1-4(a); IND. CODE 6-6-4.1-4.5(a). For purposes of the motor carrier fuel tax, the term "[h]ighway' means the entire width between the boundary lines of every publicly maintained way that is open in any part to the use of the public for purposes of vehicular travel." IC 6-6-4.1-1(f) (emphasis added). The Petitioners contend they are not subject to the motor carrier fuel tax for fuel consumed in operations on the Indiana toll road because a toll road is not a "highway" as defined in IC 6-6-4.1-1(f).

"'Statutes which impose or levy taxes may not be extended beyond the clear import of the language of the statute. Such statutes are to be construed strictly against the state and in favor of the taxpayer.'" Area Interstate Trucking, Inc., 574 N.E.2d at 314 (quoting Wechter v. Indiana Dep't of State Revenue (1989), Ind. Tx, 544 N.E.2d 221, 224, aff'd, (1990), Ind., 553 N.E.2d 844). The question, therefore, is whether the clear import of the definition of the term "highway" in IC 6-6-4.1-1(f) includes the Indiana toll road.

Because it is necessary to pay a toll to gain access to the Indiana toll road, the Petitioners assert it is not "open." The Petitioners point to a dictionary definition of the term "open" that supports their construction: "Affording unobstructed entrance and exit ... . Affording unobstructed passage ... . Accessible to all; unrestricted ... . Unhampered by restrictions." Brief in Support of Petitioners' "Highway Definition" Claim at 7 (quoting The American Heritage Dictionary of the English Language, 920 (1975)). Accordingly, the Petitioners contend that a strict construction of the term "open" within the definition of "highway" in IC 6-6-4.1-1(f) requires the exclusion of the Indiana toll road.

Such a narrow reading of the term "open" does not comport with the context of IC 6-6-4.1-1(f) as a whole. The intent of the legislature in drafting a statute cannot be determind from viewing words on a selective basis out of context from the remainder of the statute. In re Estate of Cassner (1975), 163 Ind.App. 588, 592-93, 325 N.E.2d 487, 490. Rather, words in a statute must be construed with reference to other words used therein, and with which they are associated. Indiana Creosoting Co. v. McNutt (1936), 210 Ind. 656, 667, 5 N.E.2d 310, 314. "[I]n interpreting a statute [courts] give the words used their ordinary and common meaning rather than 'overemphasizing a strict literal or selective reading of individual words.'" Area Interstate Trucking, Inc., 574 N.E.2d at 314 (quoting Spaudling v. International Bakers Servs., Inc. (1990), Ind., 550 N.E.2d 307, 309).

Therefore, the court must construe the term "open" in IC 6-6-4.1-1-1(f) in the context of the phrase "open in any part for the use of the public for purposes of vehicular travel." This phrase leaves the unmistakable impression that the legislature intended the term "open" to distinguish between public and private roads. "The fact that [people] are required to pay toll[s] for its use does not affect the question in the slightest degree. Turnpikes are public highways, notwithstanding the exaction of toll[s] for passing on them." County Comm'rs v. Chandler (1878), 96 U.S. 205, 208, 24 L.Ed. 625, 626. If the payment of a toll rendered the Indiana toll road not "open in any part to the use of the public," facilities such as state parks, city zoos, and public museums would also be considered not "open in any part to the use of the public" if admission

were charged. The Indiana Court of Appeals rejected the proposition that the Indiana toll road is not "open" within the meaning of IC 6-6-4.1-1(f), Area Interstate Trucking, Inc., 574 N.E.2d at 314, and this court follows suit.

The Petitioners further contend that the statutory schemes for the management and funding of Indiana's roads provide evidence that the legislature did not intend for the motor carrier fuel tax to apply to the consumption of fuel used in operating on the Indiana toll road. In ascertaining the legislative intent, "'statutes relating to the same general subject matter are in pari materia and should be construed together so as to produce a harmonious statutory scheme.'" Herff Jones, Inc. v. State Bd. of Tax Comm'rs (1987), Ind. Tax, 512 N.E.2d 485, 490 (quoting Sanders v. State (1984), Ind., 466 N.E.2d 424, 428).

The parties agree the statutes distributing the revenues from the motor carrier fuel tax do not provide funding for the Indiana toll road.[3] Moreover, the management of the Indiana toll road is separate from other public roads in the state.[4] The court, however, finds that subjecting Indiana toll road users to the motor carrier fuel tax does not conflict with the function of the motor carrier fuel tax statutes and therefore is not inharmonious with these statutes. Moreover, though the Indiana toll road is separately managed and funded from other public roads in the state, the imposition of the motor carrier fuel tax on Indiana toll road users will not compro-

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[3] The revenues from the motor carrier fuel tax flow into three funds (the state highway fund, the motor vehicle highway account, and the motor carrier regulation fund) that provide resources for state and local roads. See IND. CODE 6-6-4.1-5. The Indiana toll road, however, is funded exclusively through revenue bonds and tolls. See IND. CODE 8-15-2.

[4] The Transportation Finance Authority (TFA) is responsible for the management of the Indiana toll road. IND. CODE 8-9.5-8-4(a). The TFA is distinct from the Indiana Department of Transportation (INDOT), which is generally responsible for the management of the state's highways. INDOT may, however, manage the Indiana toll road pursuant to statutorily authorized contracts or leases with the TFA, but such management functions must be separated from the INDOT functions. IND. CODE 8-9.5-8-6(c)(4).

mise the statutory scheme for separate management and funding of the Indiana toll road.

In addition, IND. CODE 8-23-7-23 provides that with the approval of the governor and the TFA, INDOT may "determine that any state highway should become a toll road." The Petitioners assert IC 8-23-7-23 indicates that a toll road cannot be a highway. Although IC 8-23-7-23 distinguishes highways from toll roads, the statute does not foreclose the possibility that a toll road can be a highway. All squares are rectangles, but not all rectangles are squares.

Accordingly, this court, as did the Indiana Court of Appeals in Area Interstate Trucking, Inc., 575 N.E.2d at 314, holds that the Indiana toll road is a "highway" as defined in IC 6-6-4.1-1(f).

II.

The Petitioners contend the imposition of the motor carrier fuel tax on Indiana toll road users violates their due process and equal protection guarantees under the Fourteenth Amendment to the United States Constitution and Article 1, § 23 of the Indiana Constitution. "It is well established that the rights intended to be protected under both constitutional provisions are identical." Haas v. South Bend Community School Corp. (1972), 259 Ind. 515, 526, 289 N.E.2d 495, 501. See also Sidle v. Majors (1976), 264 Ind. 206, 210, 341 N.E.2d 763, 767. Generally, if neither a fundamental right nor a suspect class is involved, to pass equal protection muster statutes must meet a rational basis[5] test:

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[5] Although the Petitioners do not specify whether procedural or substantive due process is at issue, they assert their due process argument is subsumed in their equal protection argument, an apparent reference to substantive due process. As in the Petitioners' equal protection argument, where the rules challenged involve no regulation directed at a suspect class or toward a fundamental right, a rational basis inquiry is used to determine whether rules conform with substantive due process. See Indiana High School Athletic Ass'n, Inc. v. Schafer (1992), Ind.App., 598 N.E.2d 540, 550-51.

> [T]here is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.'

Championship Wrestling, Inc. v. State Boxing Comm'n (1985), Ind.App., 477 N.E.2d 302, 305, trans. denied (quoting Allied Stores of Ohio, Inc. v. Bowers (1959), 358 U.S. 522, 527, 79 S.Ct. 437, 441, 3 L.Ed.2d 480, 485). See also Sidle, at 210, 341 N.E.2d at 767. Statutes enjoy a strong presumption of constitutionality. Id. (citing Taxpayers Lobby of Ind., Inc. v. Orr (1974), 262 iND. 92, 311 N.E.2d 814). Moreover, "[t]he burden is on the challenger to clearly demonstrate the statute's invalidity, and all doubts are resolved in favor of the statute." Id.

The motor carrier fuel tax is calculated by multiplying the appropriate rate of tax[6] by the number of gallons of fuel consumed by a motor carrier in its operations on Indiana highways. For purposes of the motor carrier fuel tax, the amount of fuel consumed in operations on Indiana highways is:

Total amount of motor fuel consumed in its entire operations within and without Indiana	×	Total number of miles traveled on highways in Indiana / Total number of miles traveled within and without Indiana

IC 6-6-4.1-4(b); IC 6-6-4.1-4.5(b); see also 45 I.A.C. 13-4-5; 45 I.A.C. 13-8.5-2. By rearranging the foregoing formula (placing the denominator of the fraction beneath the total amount of motor

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[6] IC 6-6-4.1-4 imposes tax at the same rate as the special fuel tax under IND. CODE 6-6-2.1, currently $0.16 per gallon. IND. CODE 6-6-2.1-201. The surtax under IC 6-6-4.1-4.5(a) is imposed at a rate of $0.11 per gallon. Accordingly, the total motor carrier fuel tax is $0.27 per gallon.

fuel consumed) it can be seen for what it really is: an in toto gallons per mile figure multiplied by the miles traveled on highways in Indiana. This formula measures the proportion of miles traveled on Indiana highways to off-highway miles and miles traveled outside Indiana and allocates overall fuel consumption accordingly.[7] In addition, because the motor carrier fuel tax is based on both fuel consumption and miles traveled, motor carriers are subject to varying tax liabilities per mile, depending upon the rate and manner of fuel consumption. See, e.g., 45 I.A.C. 13-4-4 (fuel consumed in idling is included in the total gallons of fuel consumed).

Not all fuel consumption by motor carriers is subject to the motor carrier fuel tax. The motor carrier fuel tax does not apply to the portion of fuel consumed in operating auxiliary equipment on vehicles having a common fuel reservoir used for both the locomotion of the vehicle along the highway and the operation of auxiliary equipment.[8] IC 6-6-4.1-4(d); IC 6-6-4.5(d). "Vehicles exclusively operated on private property and not engaged in highway transportation are not motor vehicles" for purposes of the motor carrier fuel tax. 45 I.A.C. 13-1-3(f). Fuel consumd in operating such vehicles is therefore not subject to the motor carrier fuel tax. Likewise, miles traveled on private property are not included in the miles traveled on Indiana highways in computing

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[7] The apportionment of fuel consumption taxes to travel within a state ensures the protections afforded by the Commerce Clause of the United States Constitution. See American Trucking Ass'n v. Scheiner (1987), 483 U.S. 266, 297, 107 S.Ct. 2829, 2847, 97 L.Ed.2d 226 (discussing Pennsylvania fuel consumption tax).

[8] 45 I.A.C. 13-4-7(a) provides that motor carriers subject to the tax under IC 6-6-4.1-4 are "entitled to a proportional use exemption" for fuel used in operating auxiliary equipment on certain vehicles." Subsection (b) of this regulation establishes presumptive proportional (percentage) use exemptions for several types of vehicles with common fuel reservoirs for both locomotion and auxiliary equipment, such as ready mix concrete trucks (30%), tank trucks (24%), and sanitation trucks (41%), et cetera. Similarly, 45 I.A.C. 13-8.5-4 provides that the surtax under IC 6-6-4.1-4.5 does not apply to fuel used to operate auxiliary equipment in or on vehicles described in 45 I.A.C. 13-4-7.

the amount of fuel consumption subject to the motor carrier fuel tax.

The Petitioners contend the motor carrier fuel tax is apportioned on the basis of the benefit of the use of roads supported by the tax and therefore should not apply to fuel consumed on the Indiana toll road.

> [W]hen a state undertakes to levy local assessments apportioned to local benefits ... in that case, if it fails to conform to the standard of apportionment adopted, its action is arbitrary, see Georgia Ry. & Elec. Co. v. Decatur [(1935)], 295 U.S. 165, 170, 55 S.Ct. 701, 703, 79 L.Ed. 1365, because there is a denial of equal protection. Road Improvement Dist. v. Missouri Pacific R. Co. [1926], 274 U.S. 188, 191-194, 47 S.Ct. 563, 564, 565, 71 L.Ed. 992; cf. Georgia Ry. & Elec. Co. v. Decatur, 297 U.S. 620, 56 S.Ct. 606, 80 L.Ed. 925.

Carmichael v. Southern Coal & Coke Co. (1937), 301 U.S. 495, 523, 57 S.Ct. 868, 879, 81 L.Ed 1245, 1261, n.15.

The motor carrier fuel tax is apportioned to overall fuel consumption attributed to miles traveled on Indiana highways, but the incident of taxation chosen by the legislature is not limited to fuel consumed on roads supported by the motor carrier fuel tax. As stated above, the incident of taxation that triggers the motor carrier fuel tax is "the consumption of motor fuel by a carrier in its operations on highways in Indiana." IC 6-6-4.1-4(a); IC 6-6-4.1-4.5(a). In sum, the motor carrier fuel tax is apportioned on the basis of the benefit of the use of Indiana's public roads, regardless of whether the roads are supported by the tax. It is axiomatic that a taxpayer cannot "resist the payment of [a] tax because it is not expended for purposes which are peculiarly beneficial to him," Carmichael, at 523, 57 S.Ct. at 879, 81 L.Ed at 1261, and the state is not required to use the revenues genreated by the motor carrier fuel tax from operations on the Indiana toll road for the benefit of the Indiana toll road and its patrons.

The Petitioners also claim the purpose of the motor carrier fuel tax is to charge motor carriers only for their use of roads supported by the tax. Because the Indiana toll road is not supported by the motor carrier fuel tax, the Petitioners contend they are similarly situated to consumers of fuel for auxiliary equipment, vehicles operated exclusively on private property, and vehicles operated out-of-state, none of which are subject to the tax.

The court does not share the Petitioners' narrow vision of the purpose behind the motor carrier fuel tax. In the court's view, the purpose of the motor carrier fuel tax is simply to charge motor carriers for the use of the public roads in Indiana. The Petitioners acknowledge the tax under IC 6-6-4.1-4 is the functional compliment to the pump taxes under IND. CODE 6-6-1.1 and IC 6-6-2.1.[9] Through the tax under IC 6-6-4.1-4, motor carriers are prevented from purchasing fuel outside Indiana and then operating tax-free on the state's roads, that is, motor carriers are charged for their use of the state's roads.[10]

In light of the legislative purpose to ensure that motor carriers pay for their use of the state's roads, the distinctions between Indiana toll road users and consumers of fuel for vehicles operated exclusively on private property, for vehicles operated out-of-state, and for auxiliary equipment are plain enough. Indiana does not bear the same responsibility for the maintenance and regulation of private and out-of-state roads that it does for public roads within its borders. Likewise, fuel consumed in the operation of auxiliary equipment is not necessary linked to the use of the state's highways.

It is well settled that the legislature has broad powers in the classification of taxpayers and the creation of taxes:

---

[9] Under IC 6-6-4.1-4(c), motor fuel upon which the pump taxes are paid is not included in the amount of fuel subject to the tax.

[10] The Petitioners do not contend they should not pay the pump taxes for fuel ultimately consumed on the Indiana toll road.

> While the State is not at liberty to resort to a tax classification which is palpably arbitrary, any classification is valid provided it rests upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced are treated alike. Miles v. Dep't of Treasury (1935), 209 Ind. 172, 188, 199 N.E. 372, 380, appeal dismissed (1936), 298 U.S. 640, 56 S.Ct. 750, 80 L.Ed. 1372; Lutz v. Arnold (1935), 208 Ind. 480, 499, 193 N.E. 840, 847. Sufficient differences in the method of doing business may be justification for separate classification and differential tax treatment. See, State Bd. of Tax Comm'rs v. Jackson (1931), 283 U.S. 527, 537-543, 51 S.Ct. 540, 543-545; Miles, 209 Ind. at 190, 199 N.E. at 380.

Sunshine Promotions, Inc. v. Ridlen (1985), Ind.App., 483 N.E.2d 761, 766, trans. denied.

> Where the peculiar nature of the traffic enhances the wear and tear on the roads and augments the hazards to other traffic, thus imposing upon the State heavier financial burdens for highway maintenance and policing than other types of traffic which make general indiscriminate use, the compensation charged by the State can be correspondigly heavier. Likewise common carriers for hire, which make the highways their place of business, may properly be charged extra compensation for such use.

J. Hartman, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION § 12:3 at 670 (1981) (footnotes omitted).

In essence, the Petitioners challenge the wisdom and equity of legislative classifications that result in their payment of the motor carrier fuel tax in addition to a toll in operations upon the Indiana toll road. The presumption of a statute's validity under rational basis scrutiny "operates despite the fact that, in practice, the law results in some inequality." Sobieralski v. City of South Bend (1985), Ind.App., 479 N.E.2d 98, 100, trans. denied. The court is mindful of the burden born by the Petitioners. Nevertheless, "in our role as guardian of the constitution, we are ... a court and not

a 'supreme legislature.' We have no right to substitute our convictions as to the desirability or wisdom of legislation for those of our elected representatives." Sidle, at 209, 341 N.E.2d at 766.

For the foregong reasons, the court holds the motor carrier fuel tax, as applied to the consumption of fuel by motor carriers in operating on the Indiana toll road, offends neither the United States nor the Indiana Constitutions.[11] The Petitioners' motions for summary judgment are HEREBY OVERRULED AND DENIED, and the Respondents' cross motion for summary judgment is HEREBY GRANTED.

---

[11] The Petitioners have asked the court to answer three questions to explain why the their constitutional arguments fail:

> QUESTION 1: Is the motor carrier fuel tax a proportional tax?
> ANSWER: Yes.
>
> QUESTION 2: Assuming it is a proportional tax, what is the classification pursuant to which the tax is apportioned among taxpayers that pay the tax?
> ANSWER: The motor carrier fuel tax is imposed "on the consumption of motor fuel by a carrier in its operations on highways in Indiana." IC 6-6-4.1-4(a); IC 6-6-4.1-4.5(a).
>
> QUESTION 3: What is the fair and substantial relationship that exists between the classification and the purpose for the motor carrier fuel tax?
> ANSWER: Taxation of a motor carrier's fuel consumption that is allocated to miles traveled on Indiana highways bears an exceedingly rational connection with the purpose of the motor carrier fuel tax, that is, to charge motor carriers for their use of the state's highways.

APPENDIX C

6-6-4.1-1 Definitions

Sec. 1. As used in this chapter:

(a) "Carrier" means a person who operates or causes to be operated a commercial motor vehicle on any highway in Indiana.

(b) "Commercial motor vehicle" means a vehicle which is listed in section 2(a) of this chapter and which is not excluded from the application of this chapter under section 2(b) of this chapter.

(c) "Commissioner" means the commissioner of the Indiana department of state revenue.

(d) "Declared gross weight" means the weight at which a motor vehicle is registered with:

(1) the bureau of motor vehicles; or

(2) a state other than Indiana.

(e) "Department" means the Indiana department of state revenue.

(f) "Highway" means the entire width between the boundary lines of every publicly maintained way that is open in any part to the use of the public for purposes of vehicular travel.

(g) "Motor fuel" means gasoline (as defined in IC 6-6-1.1), special fuel (as defined in IC 6-6-2.1), and alternative fuel (as defined in IC 6-6-2.1).

(h) "Quarter" means calendar quarter.

(i) "Motor vehicle" has the meaning set forth in IC 6-6-1.1-103.

(j) "Recreational vehicle" means motor homes, pickup trucks with attached campers, and buses when used exclusively for personal pleasure. A vehicle is not a recreational vehicle if the vehicle is used in connection with a business. *As amended by P.L.96-1989, SEC.8; P.L.60-1990, SEC.3.*

APPENDIX D

6-6-4.1-2 Applicability of chapter

Sec. 2. (a) Except as provided in subsection (b), this chapter applies to each:

(1) passenger vehicle that has seats for more than nine (9) passengers in addition to the driver;

(2) road tractor;

(3) tractor truck;

(4) truck having more than two (2) axles;

(5) truck having a gross weight or a declared gross weight greater than twenty-six thousand (26,000) pounds; and

(6) vehicle used in combination if the gross weight or the declared gross weight of the combination is greater than twenty-six thousand (26,000) pounds;

that is propelled by motor fuel.

(b) This chapter does not apply to:

(1) a vehicle operated by:

(A) this state;

(B) a political subdivision (as defined in IC 36-1-2-13);

(C) the United States; or

(D) an agency of states and the United States, or of two (2) or more states, in which this state participates;

(2) a school bus (as defined by the laws of a state) operated by, for, or on behalf of a:

(A) state;

(B) political subdivision (as defined in IC 36-1-2-13) of a state; or

(C) private or privately operated school;

(3) a vehicle used in casual or charter bus operations;

(4) trucks, trailers, or semitrailers and tractors that are qualified to be registered and used as farm trucks, farm trailers, or farm semitrailers and tractors and that are registered as such by the bureau of motor vehicles under IC 9-18 or under a similar law of another state;

(5) an intercity bus (as defined in IC 9-13-2-83);

(6) a vehicle described in subsection (a)(2) through (a)(6) when the vehicle is displaying a dealer registration plate; or

(7) a recreational vehicle.

As amended by P.L.96-1989, SEC.9; P.L.60-1990, SEC.4; P.L.2-1991, SEC.42.

6-6-4.1-4 Imposition of tax; rates; computation of amount of fuel consumed in Indiana

Sec. 4. (a) A tax is imposed on the consumption of motor fuel by a carrier in its operations on highways in Indiana. The rate of this tax is the same rate per gallon as the rate per gallon at which special fuel is taxed under IC 6-6-2.1. The tax shall be paid quarterly by the carrier to the Department on or before the last day of the month immediately following the quarter.

(b) The amount of motor fuel consumed by a carrier in its operations on highways in Indiana is the total amount of motor fuel consumed in its entire operations within and without Indiana, multiplied by a fraction. The numerator of the fraction is the total number of miles traveled on highways in Indiana, and the denominator of the fraction is the total number of miles traveled within and without Indiana.

(c) The amount of tax that a carrier shall pay for a particular quarter under this section equals the product of the tax rate in effect for that quarter, multiplied by the amount of motor fuel consumed by the carrier in its operation on highways in Indiana and upon which the carrier has not paid tax imposed under IC 6-6-1.1 or IC 6-6-2.1.

(d) The tax imposed under this section does not apply to that portion of motor fuel used in Indiana to propel equipment mounted on a motor vehicle having a common reservoir for locomotion on the highway and the operation of such equipment, as determined by rule of the commissioner. *As amended by P.L.69-1991, SEC.12.*

APPENDIX F

6-6-4.1-4.5 Surtax on motor fuel consumed by carrier in Indiana highway operations

Sec. 4.5. (a) A surcharge tax is imposed on the consumption of motor fuel by a carrier in its operations on highways in Indiana. The rate of this surcharge tax is eleven cents ($0.11) per gallon. The tax shall be paid quarterly by the carrier to the department on or before the last day of the month immediately following the quarter.

(b) The amount of motor fuel consumed by a carrier in its operations on highways in Indiana is the total amount of motor fuel consumed in its entire operations within and without Indiana, multiplied by a fraction. The numerator of the fraction is the total number of miles traveled on highways in Indiana, and the denominator of the fraction is the total number of miles traveled within and without Indiana.

(c) The amount of tax that a carrier shall pay for a particular quarter under this section equals the product of the tax rate in effect for that quarter, multiplied by the amount of motor fuel consumed by the carrier in its operation on highways in Indiana.

(d) The tax imposed under this section does not apply to that portion of motor fuel used in Indiana to propel equipment mounted on a motor vehicle having a common reservoir for locomotion on the highway and the operation of this equipment as determined by rule of the commissioner. *As amended by P.L.69-1991, SEC.13.*

6-6-4.1-5 Disposition of tax revenue

Sec. 5. (a) The department shall deposit revenue collected under sections 4 and 12 of this chapter in the state highway fund (IC 8-23-9-54).

(b) The department shall deposit revenue collected under section 4.5 of this chapter as follows:

(1) Forty-five and one-half percent (45.5%) in the state highway fund (IC 8-23-9-54).

(2) Forty-five and one-half percent (45.5%) in the motor vehicle highway account (IC 8-14-1).

(3) Nine percent (9%) in the motor carrier regulation fund administered by the department.

(c) The department shall deposit revenue collected under section 13 of this chapter as follows:

(1) Thirty-five percent (35%) in the motor vehicle highway account (IC 8-14-1).

(2) Sixty-five percent (65%) in the state highway fund (IC 8-23-9-54).

As amended by P.L.18-1990, SEC.23.

APPENDIX H

45 IAC 13-1-3 Motor vehicle defined
Authority: IC 6-8.1-3-3
Affected: IC 6-6-4.1-1; IC 6-6-4.1-4

Sec. 3. (a) A "motor vehicle" is a vehicle which is propelled by an internal combustion engine or motor and is designed for highway use.

(b) The term "motor vehicle" shall not be construed to include road construction or maintenance machinery, well-boring apparatus, ditch-digging apparatus, or other similar equipment, which are occasionally operated or move over public highways.

(c) Vehicles which operate on rails are not motor vehicles.

(d) Vehicles designed and operated primarily as farm implements for drawing farm machinery are not motor vehicles.

(e) Tractors, plows, mowing machines, harvesters, Big A's, and other agricultural implements, including farm machinery when mounted and transported upon a trailer, are not motor vehicles when operated on a farm or when traveling upon public highways from one field to another, or to and from places of repair or supply.

(f) Vehicles exclusively operated on private property and not engaged in highway transportation are not motor vehicles.

(g) Upon determination by the administrator, the tax imposed under IC 6-6-4.1-4 will not apply to that portion of the fuel consumed on Indiana highways by motor vehicles with a common fuel reservoir for both locomotion along the highway and the operation of equipment with another commercial purpose even though such vehicles are motor vehicles for purposes of IC 6-6-4.1.

(1) For purposes of IC 6-6-4.1, commercial purpose means the exchange of goods and services in contemplation of profit; and

(2) includes non-proprietary functions of governmental agencies and not-for-profit organizations.

-EXAMPLES-

(1) A truck manufacturer tests trucks on a test track located on the manufacturer's property. Although the trucks are

primarily adapted for highway transportation, they are not engaged in highway transportation and therefore, are not considered motor vehicles.

(2) In a mining operation haulage trucks are employed to transport coal from the pit to a crusher and then to a processing plant. The roadway between the pit and the crusher is a private roadway. The roadway between the crusher and the processing plant is a public highway. Haulage trucks operated exclusively for transportation on private property are not considered motor vehicles. However, haulage trucks which at one time or another travel upon a public highway are considered motor vehicles.

(Department of State Revenue; Reg 6-6-4.1-1(b)(020); filed Jul 13, 1984, 9:25 am: 7 IR 2316; filed Apr 30, 1986, 3:30 pm: 9 IR 2191)

Cited in: 45 IAC 13-1-4.

APPENDIX I

45 IAC 13-1-11 Highway defined
Authority: IC 6-8.1-3-3
Affected: IC 6-6.4-1-1

Sec. 11. (a) The term "highway" shall mean the entire width between the boundary lines of every thoroughfare that is open in any part to the use of the public for purposes of vehicular travel.

(b) For purposes of IC 6-6-4.1, a toll road is a highway. *(Department of State Revenue; Reg 6-6-4.1-1(e)(010); filed Jul 13, 1984, 9:25 am: 7 IR 2317)*

APPENDIX J

45 IAC 13-4-7 **Proportional imposition of tax**
Authority: **IC 6-8.1-3-3**
Affected: **IC 6-6-4.1-4**

Sec. 7. (a) A motor carrier subject to the tax imposed under IC 6-6-4.1-4 is entitled to a proportional use exemption for tax paid on use of fuel for a commercial purpose when the fuel is placed into the fuel supply tank of the taxpayer's motor vehicle which has a common fuel supply reservoir for both locomotion on a public highway and a commercial purpose which is exempt from the motor carrier fuel tax, and if the person is the purchaser of the fuel and has paid the motor carrier fuel tax thereon. For purposes of the exemption, the fuel used for the commercial purpose other than locomotion of the motor vehicle must be used in Indiana.

(b) For purposes of subsection (a), proportional use exemptions shall be presumed to be as follows:

(1) For ready mix concrete trucks, thirty percent (30%) of the motor fuel which is consumed on Indiana highways by a ready mix concrete truck which has a common fuel reservoir for both locomotion on the highway and the operation of the concrete mixing equipment.

(2) For tank trucks, twenty-four percent (24%) of the motor fuel which is consumed on Indiana highways by a tank truck which has a common fuel reservoir for both locomotion on the highway and the operation of the pumping equipment.

(3) For sanitation trucks, forty-one percent (41%) of the motor fuel which is consumed on Indiana highways by a sanitation truck which has a common fuel reservoir for both locomotion on the highway and the operation of the refuse collection equipment.

(4) For refrigeration trucks, fifteen percent (15%) of the motor fuel which is consumed on Indiana highways by a refrigeration truck which has a common fuel reservoir for both locomotion on the highway and the operation of the refrigeration equipment.

(5) For mobile cranes, forty-two percent (42%) of the motor fuel which is consumed on Indiana highways by a mobile crane

which has a common fuel reservoir for both locomotion on the highway and the operation of the crane.

(6) For bulk feed trucks, fifteen percent (15%) of the motor fuel which is consumed on Indiana highways by a bulk feed truck which has a common fuel reservoir for both locomotion on the highway and the operation of the pumping equipment.

(7) For milk tank trucks, thirty percent (30%) of the motor fuel which is consumed on Indiana highways by a milk tank truck which has a common fuel reservoir for both locomotion on the highway and the operation of the pumping equipment.

(8) For lime spreader trucks, fifteen percent (15%) of the motor fuel which is consumed on Indiana highways by a lime spreader truck which has a common fuel reservoir for both locomotion on the highway and the operation of the spreading equipment.

(9) For spray trucks, fifteen percent (15%) of the motor fuel which is consumed on Indiana highways by a spray truck which has a common fuel reservoir for both locomotion on the highway and the operation of the spraying equipment.

(10) For seeder trucks, fifteen percent (15%) of the motor fuel which is consumed on Indiana highways by a seeder truck which has a common fuel reservoir for both locomotion on the highway and the operation of the seeding equipment.

(11) For leaf trucks, twenty percent (20%) of the motor fuel which is consumed on Indiana highways by a leaf truck which has a common fuel reservoir for both locomotion on the highway and the operation of the shredding equipment.

(12) For boom trucks or block booms, twenty percent (20%) of the motor fuel which is consumed on Indiana highways by a boom truck or block boom which has a common fuel reservoir for both locomotion on the highway and the operation of the boom equipment.

(13) For service trucks with a jackhammer or pneumatic drill, fifteen percent (15%) of the motor fuel which is consumed on Indiana highways by a service truck with a jackhammer or pneumatic drill which has a common fuel reservoir for both locomotion on the highway and the operation of the jackhammer or pneumatic drill.

(14) For trucks with a power take-off hydraulic winch, twenty percent (20%) of the motor fuel which is consumed on Indiana

highways by a truck with a power take-off hydraulic winch which has a common fuel reservoir for both locomotion on the highway and the operation of the hydraulic winch.

(15) For wreckers, ten percent (10%) of the motor fuel which is consumed on Indiana highways by a wrecker which has a common fuel reservoir for both locomotion on the highway and the operation of the hoist.

(16) For semitractor wreckers, thirty-five percent (35%) of the motor fuel which is consumed on Indiana highways by a semitractor wrecker which has a common fuel reservoir for both locomotion on the highway and the operation of the hoist.

(17) For car carriers with a hydraulic winch, ten percent (10%) of the motor fuel which is consumed on Indiana highways by a car carrier with a hydraulic winch which has a common fuel reservoir for both locomotion on the highway and the operation of the hydraulic winch.

(18) For dump trucks, twenty-three percent (23%) of the motor fuel which is consumed on Indiana highways by a dump truck which has a common fuel reservoir for both locomotion on the highway and the operation of the dump mechanism.

(19) For semitractor and dump trailer combinations (commonly referred to as dump trailers), fifteen percent (15%) of the motor fuel which is consumed on Indiana highways by a semitractor and dump trailer combination which has a common fuel reservoir for both locomotion on the highway and the operation of the dump mechanism.

(20) For semitractor and tank trailer combinations (commonly referred to as a tank transport), fifteen percent (15%) of the motor fuel which is consumed on Indiana highways by a semitractor and tank trailer combination which has a common fuel reservoir for both locomotion on the highway and the operation of the pumping equipment.

(21) For pneumatic tank trucks, fifteen percent (15%) of the motor fuel which is consumed on Indiana highways by a pneumatic tank truck which has a common fuel reservoir for both locomotion on the highway and the operation of the pumping equipment.

(22) For sanitation receptacle carriers (commonly referred to as a sanitation dump trailer), fifteen percent (15%) of the motor fuel which is consumed on Indiana highways by a

sanitation receptacle carrier which has a common fuel reservoir for both locomotion on the highway and the operation of the winching or dumping mechanism.

(23) For line trucks or aerial lift trucks, twenty percent (20%) of the motor fuel which is consumed on Indiana highways by a line truck or aerial lift truck which has a common fuel reservoir for both locomotion on the highway and the operation of the lift equipment.

(24) For digger-derrick trucks, twenty percent (20%) of the motor fuel which is consumed on Indiana highways by a digger-derrick truck which has a common fuel reservoir for both locomotion on the highway and the operation of the other commercial equipment.

(25) For sewer cleaning trucks, sewer jets, or sewer vactors, thirty-five percent (35%) of the motor fuel which is consumed on Indiana highways by a sewer cleaning truck, a sewer jet, or a sewer vactor which has a common fuel reservoir for both locomotion on the highway and the operation of the cleaning equipment.

(26) For hot asphalt distribution trucks, ten percent (10%) of the motor fuel which is consumed on Indiana highways by a hot asphalt distribution truck which has a common fuel reservoir for both locomotion on the highway and the operation of the distribution equipment.

(27) For snow plow trucks, ten percent (10%) of the motor fuel which is consumed on Indiana highways by a snow plow truck which has a common fuel reservoir for both locomotion on the highway and the operation of the plow.

(28) For carpet cleaning vans, fifteen percent (15%) of the motor fuel which is consumed on Indiana highways by a carpet cleaning van which has a common fuel reservoir for both locomotion on the highway and the operation of the cleaning equipment.

(29) For salt spreaders or dump trucks with spreaders, fifteen percent (15%) of the motor fuel which is consumed on Indiana highways by a salt spreader or a dump truck with a spreader which has a common fuel reservoir for both locomotion on the highway and the operation of the spreading equipment.

(30) For sweeper trucks, twenty percent (20%) of the motor fuel which is consumed on Indiana highways by a sweeper

truck which has a common fuel reservoir for both locomotion on the highway and the operation of the sweeping equipment.

(31) For bookmobiles, twenty-five percent (25%) of the motor fuel which is consumed on Indiana highways by a bookmobile which has a common fuel reservoir for both locomotion on the highway and the operation of the other commercial equipment.

(32) For buses, ten percent (10%) of the motor fuel which is consumed on Indiana highways by a bus which has a common fuel reservoir for both locomotion on the highway and the operation of the other commercial equipment.

(33) For fire trucks, forty-eight percent (48%) of the motor fuel which is consumed on Indiana highways by a fire truck which has a common fuel reservoir for both locomotion on the highway and the operation of the other commercial equipment.

(34) For super suckers, ninety percent (90%) of the motor fuel which is consumed on Indiana highways by a super sucker which has a common fuel reservoir for both locomotion on the highway and the operation of the other commercial equipment.

(c) Notwithstanding the provisions of subsection (b)(1-34) [*subsection (b)*], motor carrier fuel taxpayers operating listed motor vehicles which consume greater portions of fuel from a common fuel reservoir for a commercial purpose other than locomotion on a public highway in Indiana than provided in subsection (b)(1-34) [*subsection (b)*] are eligible for a greater exemption to be determined by the administrator after:

(1) a showing by the person or carrier of the proportion of motor fuel used for the operation of equipment other than for locomotion on the public highway; and

(2) presentation of documents and information as requested by the administrator.

(d) Notwithstanding the provisions of subsection (b)(1-34) [*subsection (b)*], motor carrier fuel taxpayers operating motor vehicles not listed in subsection (b)(1-34) [*subsection (b)*] which consume portions of fuel from a common fuel reservoir for a commercial purpose other than locomotion on a public highway in Indiana are eligible for a proportional use exemption to be determined by the administrator after:

(1) a showing by the person or carrier of the proportion of motor fuel used for the operation of equipment other than for locomotion on the public highway; and

(2) presentation of documents and information as requested by the administrator.

(Department of State Revenue; Reg 6-6-4.1-4(d)(010); filed Apr 30, 1986, 3:30 p.m.: 9 IR 2193; filed Mar 6, 1991, 2:20 p.m.: 14 IR 1374; errata, 14 IR 1616)

Cited in: 45 IAC 13-8.5-4.

No. 93-106

In The

Supreme Court of the United States

October Term, 1993

AREA INTERSTATE TRUCKING, INC., INDIANA MATERIAL TRANSFER, INC., ADVANCE TRANSPORTATION COMPANY, BRYAN TRUCK LINE, INC., CHURCHILL TRUCK LINES, INC., FRANKS & SON, INC., GREAT AMERICAN LINES, INC., KAT, INC., and MOGLE ENTERPRISES, INC. on behalf of themselves and all others similarly situated,

Petitioners,

v.

INDIANA DEPARTMENT OF REVENUE and KENNETH L. MILLER, as Acting Commissioner of the Indiana Department of Revenue,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Indiana

RESPONDENTS' BRIEF IN OPPOSITION

RICHARD A. HUSER
Counsel of Record for Respondents
LOCKE REYNOLDS BOYD & WEISELL
1000 Capital Center South
201 North Illinois Street
Indianapolis, Indiana 46204
(317) 237-3800

JULIA M. BLACKWELL
ROBERT W. WRIGHT
Co-Counsel for Respondents

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QUESTIONS PRESENTED

Respondents, Indiana Department of Revenue and Kenneth L. Miller, Acting Commissioner of the Indiana Department of Revenue, restate the questions presented in the Petition for Writ of Certiorari as follows:

A. Whether the United States Supreme Court is bound by the Indiana Tax Court's construction of the Motor Carrier Fuel Tax.

B. Whether the Indiana Tax Court's construction of the Motor Carrier Fuel Tax violates Petitioners' rights to equal protection and due process of law under the United States Constitution.

C. Whether the United States Supreme Court should adopt a new, "sliding-scale" approach to its rational-basis scrutiny of state tax statutes.

LIST OF PARTIES

Respondents adopt Petitioners' list of parties with regard to petitioners, with the exception that no class has been certified as of this date. (Supplemental Appendix at 14). Respondents are not corporations.

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No. 93-106

In The

Supreme Court of the United States

October Term, 1993

AREA INTERSTATE TRUCKING, INC., INDIANA MATERIAL TRANSFER, INC., ADVANCE TRANSPORTATION COMPANY, BRYAN TRUCK LINE, INC., CHURCHILL TRUCK LINES, INC., FRANKS & SON, INC., GREAT AMERICAN LINES, INC., KAT, INC., and MOGLE ENTERPRISES, INC. on behalf of themselves and all others similarly situated,

Petitioners,

v.

INDIANA DEPARTMENT OF REVENUE and KENNETH L. MILLER, as Acting Commissioner of the Indiana Department of Revenue,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Indiana

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

Petitioners improperly seek a writ of certiorari with respect to an unpublished final order of the Supreme Court of Indiana issued on April 14, 1993 (A. 1a). The Writ of Certiorari, if issued, should in fact be directed to the Indiana Tax Court with respect to the decision of the Indiana Tax Court reported at 605 N.E.2d 272 (1992)

(A. 2a), which decision was rendered a final judgment by the Indiana Tax Court pursuant to Indiana Trial Rule 56(C) on January 26, 1993. (Supplemental Appendix at 1).

JURISDICTION

Petitioners seek to invoke this Court's jurisdiction pursuant to 28 USC § 1257(a) (1992). Petitioners essentially dispute the Indiana Tax Court's construction of the Indiana Motor Carrier Fuel Tax and the wisdom of the application of that tax to motor carriers traveling on the Indiana Toll Road. The United States Supreme Court lacks jurisdiction to address either of these issues.

Petitioners have improperly requested that the Writ of Certiorari be directed to the Surpeme Court of Indiana rather than to the Indiana Tax Court. The Writ of Certiorari, if issued, should be directed to the Indiana Tax Court, the highest court of the state that actually ruled on the merits. Additionally, Petitioners failed to include a copy of the final judgment sought to be reviewed in the Appendix of their Petition, and Petitioner's jurisdictional statement does not reference the date of entry of the judgment sought to be reviewed. Respondents have included a copy of that judgment in the Supplemental Appendix at 1.

Petitioners contend that the Petition draws into question the validity of a state statute on the ground that it is repugnant to the United States Constitution. Although this Court would have jurisdiction to address that question, the state statute in question is not repugnant to the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The primary relevant statutory provisions are Ind. Code §§ 6-6-4.1-4(a) and 6-6-4.1-4.5(a) (1992).

Respondents acknowledge that the Petition for Writ of Certiorari argues that the state statute in question is violative of Section 1 of the Fourteenth Amendment to the United States Constitution. While Respondents deny that the state statute in question is in any way repugnant to the United States Constitution, Respondents agree that the subject matter of the Writ involves Section 1 of the Fourteenth Amendment to the United States Constitution.

In addition to the remaining statutory provisions and regulations set forth in Petitioners' Appendix, Ind. Code § 6-6-4.1-6 (1988) is also a relevant statutory provision. (Supplemental Appendix at 3).

STATEMENT OF THE CASE

Petitioners filed a two count Amended Verified Petition to Enjoin Collection of Tax and Original Tax Appeal ("Amended Verified Petition") with the Indiana Tax Court on July 22, 1991. Count I requested declaratory and injunctive relief, and Count II requested a refund of taxes already paid.

Petitioners filed a Motion for Summary Judgment on Count I of the Amended Verified Petition, raising the following issues:

I. Whether the Indiana toll road is a "highway" as defined under I.C. 6-6-4.1-1(f) for purposes of the Motor Carrier Fuel Tax?

II. Whether imposition of the Motor Carrier Fuel Tax upon fuel consumed in operating on the Indiana toll road is constitutional?

(A. 4a)

Respondents filed a Cross-Motion for Summary Judgment on these same issues. Following full briefing and oral argument, the Tax Court denied Petitioners' Motion and granted Respondents' Cross-Motion for Summary Judgment on both issues by its published opinion dated December 29, 1992. This Partial Summary Judgment Order was rendered final pursuant to Indiana Trial Rule 56(C) on January 26, 1993.

The Indiana Tax Court was not the first Indiana court of appellate jurisdiction to consider the issues raised by Petitioners' Amended Verified Petition. One of the Petitioners, Area Interstate Trucking, Inc., had previously filed a Motion to Intervene in a class action lawsuit in the Johnson County, Indiana Circuit Court. The Motion to Intervene raised these same issues, albeit in a different procedural context. The Trial Court denied Area's Motion to Intervene. The Indiana Court of Appeals affirmed the Trial Court's decision in *Area Interstate Trucking, Inc. v. Indiana State Dep't of Revenue*, 574 N.E.2d 311 (Ind. App. 1991), *transfer denied*, and the Indiana Supreme Court denied transfer on October 8, 1991.

Petitioners operate "commercial motor vehicles" subject to the Motor Carrier Fuel Tax, Ind. Code § 6-6-4.1-1 (1992). Petitioners are subject to this tax because they operate vehicles upon Indiana highways. Petitioners are

required to calculate the amount of taxable fuel based on the mileage their vehicles operate on Indiana highways, including the Indiana toll road. Petitioners are required to include toll road mileage in their calculation because the Indiana Toll Road is a highway, as defined by the Motor Carrier Fuel Tax statute. Both the Indiana Court of Appeals and the Indiana Tax Court have now so held.

The Motor Carrier Fuel Tax is not imposed upon fuel consumed in operations exclusively upon private property or upon the portion of fuel used to operate auxiliary equipment mounted on motor vehicles subject to the tax, because such fuel consumption is not for purposes of operating or propelling commercial motor vehicles on highways in Indiana.

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioners have failed to identify a valid basis for granting the Writ. Their Petition invites this Court to interpret state legislation contrary to a state appellate court's interpretation, to apply general rules of law to inapplicable factual situations, and to alter the firmly established standard for review of equal protection challenges to state tax statutes. None of these requests provide a valid basis for review by this Court. The Indiana Tax Court's well-reasoned and well-articulated decision does not necessitate this Court's reiteration of firmly established precedent of this Court.

1. The Indiana Tax Court's construction of the Indiana Motor Carrier Fuel Tax is binding upon the United States Supreme Court.

The Petition for Writ of Certiorari presented in this case does not involve a conflict between a state appellate court decision (i.e. the decision of the Indiana Tax Court)[1] and the United States Supreme Court decision of *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937) as alleged by Petitioners. Rather, the Petition involves disgruntled taxpayers who insist that the Indiana Motor Carrier Fuel Tax should be given an interpretation which is more favorable to them. Because it is not the function of this Court to construe that state statute, the Petition for Writ of Certiorari should be denied.

The Indiana Motor Carrier Fuel Tax is imposed "on the consumption of motor fuel by a carrier in its operations on highways in Indiana." Ind. Code § 6-6-4.1-4(a) (1992); Ind. Code § 6-6-4.1-4.5(a) (1992). As previously determined by both the Indiana Court of Appeals and the Indiana Tax Court, the plain and ordinary meaning of highway includes a toll road. *Area Interstate Trucking, Inc. v. Indiana State Dep't of Revenue*, 574 N.E.2d 311 (Ind. App. 1991), *transfer denied; Area Interstate Trucking, Inc. v. Indiana Dep't of Revenue*, 605 N.E.2d 272, 277 (Ind. Tax Ct. 1992), *review denied*. Petitioners agree that they are subject to this tax as motor carriers providing for-hire transportation services through the operation of their trucks and

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[1] The Indiana Tax Court is considered a court of appellate jurisdiction. Decisions of the Indiana Tax Court may be appealed to the Indiana Supreme Court. Ind. Code § 33-3-5-15 (1988).

tractor-trailer vehicles on Indiana highways. Petitioners, however, argue that the "plain" and "clear" objective of this legislation is to assess a tax in direct proportion to the "consumption" of roads in Indiana, and that the purpose of the tax is to collect from taxpayers their proportionate share of the cost of maintaining the roads upon which they travel.

Petitioners' view of the legislative intent behind the Indiana Motor Carrier Fuel Tax deserves no consideration by this Court because it is directly contradicted by the Indiana Tax Court's decision. The Indiana Tax Court specifically held that "the motor carrier fuel tax is apportioned on the basis of the benefit of the use of Indiana's public roads, regardless of whether the roads are supported by the tax." *Area Interstate Trucking, Inc. v. Indiana Dep't of Revenue*, 605 N.E.2d at 277. The purpose of this tax, as determined by the Indiana Tax Court, is simply to charge motor carriers for the use of the public roads in Indiana. *Id.* This Court must accept the Indiana Tax Court's interpretation of this Indiana legislation.

There is no doubt that the United States Supreme Court is bound by a state court's construction of a state statute. *Wisconsin v. Mitchell*, 113 S.Ct. 2194, 2198 (1993). The United States Supreme Court lacks "jurisdiction authoritatively to construe state legislation." *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 369 (1971). Likewise, "legislative intent is a matter of state law, on which the highest court of a state speaks with finality." *Minotti v. Lensink*, 798 F.2d 607, 610 (2nd Cir. 1986), *cert. denied*, 482 U.S. 906 (1987) (citation omitted). This Court is not at liberty to depart from a state appellate court's

resolution of issues of state law. *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 629 (1988).

This rule applies with equal force to the decision of the Indiana Tax Court, an intermediate appellate state court.

> Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise . . . . This is the more so where, as in this case, the highest court has refused to review the lower court's decision rendered in one phase of the very litigation which is now prosecuted by the same parties before the federal court.

Feiock, 485 U.S. at 630 n.3 (citations omitted). The Indiana Tax Court's interpretation of the Motor Carrier Fuel Tax, which the Indiana Supreme Court refused to review, is binding upon this Court.

2. The Indiana Tax Court's construction of the Indiana Motor Carrier Fuel Tax does not violate Petitioners' rights to equal protection and due process of law under the United States Constitution.

This Court's required adherence to the Indiana Tax Court's determination of the legislative intent behind the Motor Carrier Fuel Tax essentially disposes of this Petition for Writ of Certiorari. As Petitioners concede, the State of Indiana was not compelled by any constitutional requirement to tax fuel consumption in direct relation to

the benefits taxpayers enjoy. (Petitioners' Brief, pp. 9-10). As finally determined by the Indiana Tax Court, the State of Indiana chose to tax the use of all highways in Indiana, regardless of whether the highway was directly supported by the tax. *Area Interstate Trucking, Inc. v. Indiana Dep't of Revenue*, 605 N.E.2d at 277. Thus, no equal protection violation is presented to this Court, and there is no conflict with *Carmichael*.

Carmichael plainly sets forth, as the Indiana Tax Court recognized, the general rule that a taxpayer cannot resist the payment of a tax merely because it is not expended for purposes which are peculiarly beneficial to it. As this Court explained:

> A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. . . . Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve the abandonment of the most fundamental principle of government – that it exists primarily to provide for the common good. A corporation cannot object to the use of the taxes which it pays for the maintenance of schools because it has no children.

Carmichael, 301 U.S. at 522-23 (citation omitted). This firmly established rule has led the Court to reject arguments such as the one advanced by Petitioners.

> This Court has repudiated the suggestion, whenever made, that the Constitution requires the benefits derived from the expenditure of public moneys to be apportioned to the burdens of the taxpayer, or that he can resist the payment of the tax because it is not expended for purposes which are peculiarly beneficial to him.

Id. at 523.

The principles set forth in *Carmichael* similarly require repudiation of Petitioners' suggestion that the Indiana Motor Carrier Fuel Tax is unconstitutional as applied to them because the State does not use revenues generated by that tax for the benefit of the Indiana Toll Road and its patrons. The tax charges motor carriers for the use of the public roads in Indiana. *Area Interstate Trucking*, 605 N.E.2d at 277. "[C]ommon carriers for hire, which make the highways their place of business, may properly be charged extra compensation for such use." *Id.* at 278 (quoting J. Hartman, *Federal Limitations on State and Local Taxation* § 12:3 at 670 (1981) (footnotes omitted)). Petitioners make the Indiana highways, including the Indiana Toll Road, their place of business and may properly be charged extra compensation for such use. The Indiana Tax Court's decision is consistent with the holding of *Carmichael*.

Petitioners assert that this case falls within an exception to the general rule, citing a footnote in *Carmichael*. The footnote cited, however, addresses a factual situation which is not present here. This case does not involve a tax assessed upon real property owners in a local governmental district based on the value of benefits accruing to

those property owners from a specific improvement project.[2] The benefits derived from the tax need not be, and in this instance are not, apportioned to the burdens of the taxpayer. "[T]he state is not required to use the revenues generated by the motor carrier fuel tax from operations on the Indiana toll road for the benefit of the Indiana toll road and its patrons." *Area Interstate Trucking*, 605 N.E.2d at 277.

The State of Indiana's decision to tax toll road usage does not violate Petitioners' equal protection or due process rights. As Petitioners concede, they are subject to the Indiana Motor Carrier Fuel Tax because they are motor carriers providing for-hire transportation services and their vehicles consume fuel in operations upon Indiana highways, which include the Indiana Toll Road. (Petitioners' Brief, p. 4). "In light of the legislative purpose to ensure that motor carriers pay for their use of the state's roads, the distinctions between Indiana toll road users" and the exempt users "are plain enough." *Area Interstate Trucking*, 605 N.E.2d at 277. Consumers of fuel used for vehicles operated exclusively on private property, for

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[2] Petitioners fail to discuss, or even to cite, the cases in that footnote addressing this different question. Neither *Georgia Ry. & Electric Co. v. City of Decatur*, 295 U.S. 165 (1935) nor *Road Improvement Dist. No. 1 v. Missouri Pac. R. Co.*, 274 U.S. 188 (1927) involve a factual situation which is even remotely similar to the one presented in this case. In each of those cases, the statute or ordinance which directed an assessment for the cost of improvements required that the assessment be measured by the benefit each local taxpayer received from the improvement project. In each case, the assessment levied was ruled improper either because there was no benefit to the taxpayer, or the assessment was not properly made in proportion to the benefit received.

vehicles operated out-of-state, and for auxiliary equipment, unlike toll road users, are not providing for-hire transportation services in operations upon Indiana public roads.

Petitioners present a similarly meritless assertion that their equal protection rights are violated based upon what they consider to be the "real impact" of the tax. Petitioners claim that they are the only taxpayers required to pay tax for vehicular use of public roads not supported by the tax collected. They claim, but fail to establish, that there is no conceivable basis to support the tax of toll road usage. *See F.C.C. v. Beach Communications, Inc.*, 113 S.Ct. 2096, 2102 (1993). One conceivable basis for taxing toll road usage is to compensate Indiana for the indirect burdens imposed by the toll road. As noted by the Supreme Court of New Jersey:

> [T]he State incurs many expenses in connection with the use of the Turnpike and Parkway. Subsidiary roads are high-cost roads to the State because of the traffic congestion thereon resulting from Turnpike and Parkway traffic. And the State incurs other expenses in the administration of its road laws in connection with toll road use.

Safeway Trails, Inc. v. Furman, 41 N.J. 467, 197 A.2d 366, 376 (1964), *appeal dismissed, cert. denied*, 379 U.S. 14 (1964). The indirect benefits afforded to the toll road users are more than sufficient to meet the minimal requirements of the rational-basis test.

Further, Petitioners' assertion that they are the only taxpayers required to pay tax for vehicular use of public

roads not supported by the tax collected is a misstatement of fact. Even if every other road in Indiana were eligible to receive funds from the Motor Carrier Fuel Tax, Petitioners have not established that every alley, street and county road in Indiana does in fact receive such funds. The Legislature's determination that the Toll Road does not need funds from the Motor Carrier Fuel Tax is no different than a local official determining that an alley does not need funds in any particular year. The real impact of the tax is the same: funds are used by the State of Indiana where they are needed most. This discretion is precisely the reason for the deferential standard for review afforded to equal protection challenges to tax statutes.

Petitioners' real complaint with the Motor Carrier Fuel Tax deals with their perception of the wisdom and equity of that tax. *See Area Interstate Trucking, Inc. v. Indiana Dep't of Revenue*, 605 N.E.2d at 278.

> Time and again, however, this Court has made clear in the rational-basis context that the "Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted."

Nordlinger v. Hahn, 112 S.Ct. 2326, 2335-36 (1992) (citation omitted). This Court need not grant a Writ of Certiorari in this case simply to remind Petitioners that it is not the function of this Court to comment on the wisdom of legislative decisions. *See Beach Communications*, 113 S.Ct. at 2101.

3. The alleged complexity of the Indiana Motor Carrier Fuel Tax does not warrant modification of the firmly established rational-basis standard for review of equal protection challenges to state tax statutes.

Petitioners implicitly concede that no writ is warranted in this case by asserting that this Court should heighten the standard of review for equal protection challenges to state tax statutes. Petitioners suggest that this Court adopt a "sliding-scale"[3] approach to reviewing such challenges. This approach conflicts with the well-established approach followed by this Court.

> [T]his Court's cases are clear that, unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest.

Nordlinger, 112 S.Ct. at 2331. The Motor Carrier Fuel Tax does not jeopardize any fundamental right, such as freedom of speech, nor does it categorize on the basis of an inherently suspect characteristic, such as race or nationality. Petitioners have failed to establish any basis for a heightened standard of review in this case.

Petitioners suggest that the rational-basis standard for review should evolve with regard to modern-day tax

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[3] This approach is totally unworkable, because it leaves no definite standard to be applied and would require this Court to review virtually every equal protection challenge to new tax laws.

cases. More than 50 years ago, this Court commented on the wisdom of the rational-basis standard:

> The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized. . . . [T]he passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies.

Madden v. Kentucky, 309 U.S. 83, 87-88 (1940). Fifty years later, this Court still adheres to that philosophy. *Leathers v. Medlock*, 111 S.Ct. 1438, 1446 (1991), (quoting *Madden*, 309 U.S. at 87-88). The "standard is especially deferential in the context of classifications made by complex tax laws." *Nordlinger*, 112 S.Ct. at 2332. Because Petitioners' arguments regarding the standard for review of equal protection challenges have been soundly rejected by this Court, the Court should deny the Petition for Writ of Certiorari in this case.

CONCLUSION

The Motor Carrier Fuel Tax is imposed on the consumption of motor fuel by a carrier in its operations on highways in Indiana. Both the Indiana Court of Appeals and the Indiana Tax Court have held that the Indiana Toll Road is a highway within the meaning of the statute, and that holding is not challenged by the Petitioners herein.

The Indiana Tax Court has construed the purpose of the Motor Carrier Fuel Tax statute as simply to charge motor carriers for the use of the public roads in Indiana. This Court is bound by that construction, and Petitioners' efforts to advance a different interpretation, *i.e.*, that the purpose of the Motor Carrier Fuel Tax is to charge motor carriers only for their use of highways supported by the tax, is improper and cannot form the basis for the issuance of a Writ of Certiorari.

The Indiana Legislature has broad powers in the classification of taxpayers and the creation of taxes. The Motor Carrier Fuel Tax is apportioned on the basis of the use of Indiana's public roads, regardless of whether the roads are supported by the tax. The State of Indiana is not required to use the revenues generated by the Motor Carrier Fuel Tax from operations on the Indiana Toll Road for the benefit of the Indiana Toll Road and its patrons. The State of Indiana's decision to tax toll road usage does not violate Petitioners' equal protection or due process rights.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

RICHARD A. HUSER
Counsel for Respondents

LOCKE REYNOLDS BOYD & WEISELL
1000 Capital Center South
201 North Illinois Street
Indianapolis, Indiana 46204
(317) 237-3800

JULIA M. BLACKWELL
ROBERT W. WRIGHT
Co-Counsel for Respondents

SUPPLEMENTAL APPENDICES

APPENDIX J

IN THE INDIANA TAX COURT

CASE NO. 49T10-9105-TA-00022

AREA INTERSTATE TRUCKING, INC., INDIANA MATERIAL TRANSFER, Inc., ADVANCE TRANSPORTATION COMPANY, BRYAN TRUCK LINE, INC., CHURCHILL TRUCK LINES, INC., FRANKS & SON, INC., GREAT AMERICAN LINES, INC., KAT, INC. and MOGLE ENTERPRISES, INC., on behalf of themselves and all others similarly situated,	FILED JAN 26 1993
Petitioners,	
vs.	
INDIANA DEPARTMENT OF REVENUE and KENNETH L. MILLER, as Acting Commissioner of the Indiana Department of Revenue,	
Respondents.	

FINAL JUDGMENT ENTRY PURSUANT TO IND. TRIAL RULE 56(C)

The Court, having issued an opinion in this case on December 29, 1992 and having denied Petitioners' Motions for Summary Judgment and granted Respondents' Cross-Motion for Summary Judgment, hereby finds that there are no genuine issues of material fact with respect to Count I of Petitioners' Amended Verified

Petition to Enjoin Collection of Tax and Original Tax Appeal ("Amended Petition") and that summary judgment should be entered thereon. Such summary judgment, being entered upon less than all of the claims in this case, is hereby rendered final pursuant to Ind. Trial Rule 56(C) based upon the Court's express findings herein that there is no just reason for delay and that Petitioners, if they so choose, should be permitted to file with the Indiana Supreme Court a Petition for Review of the Court's December 29, 1992 opinion.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that final summary judgment is hereby entered in favor of Respondents on Count I of the Amended Petition this 26th day of January, 1993.

/s/ Thomas G. Fisher
Thomas G. Fisher, Judge
Indiana Tax Court

COPIES TO:

James H. Hanson
Michael J. Tosick
SCOPELITIS, GARVIN, LIGHT & HANSON
1777 Market Tower
10 West Market Street
Indianapolis, IN 46204

Richard A. Huser
Kevin Charles Murray
LOCKE REYNOLDS BOYD & WEISELL
1000 Capital Center South
201 North Illinois Street
Indianapolis, IN 46204

APPENDIX K

6-6-4.1-6 Credits against tax

Sec. 6. (a) A carrier is entitled to a credit against the tax imposed under section 4 of this chapter if the carrier, or a lessor operating under the carrier's annual permit, has:

(1) paid the tax imposed under IC 6-6-1.1 or IC 6-6-2.1 on motor fuel purchased in Indiana;

(2) consumed the motor fuel outside Indiana; and

(3) paid a gasoline, special fuel, or road tax with respect to the fuel in one (1) or more other states or jurisdictions.

(b) The amount of credit for a quarter is equal to the tax paid under IC 6-6-1.1 and IC 6-6-2.1 on motor fuel that:

(1) was purchased in Indiana;

(2) was consumed outside Indiana; and

(3) with respect to which the carrier paid a gasoline, special fuel, or road tax to another state or jurisdiction.

(c) To qualify for the credit, the carrier shall submit any evidence required by the department of payment of the tax imposed under IC 6-6-1.1 or IC 6-6-2.1.

(d) A credit earned by a carrier in a particular quarter shall be applied against the carrier's tax liability under this chapter for that quarter before any credit carryover is applied against that liability under section 7

of this chapter. *As added by Acts 1982, P.L.59, SEC.1. Amended by P.L.77-1985, SEC.28.*

APPENDIX L

AREA INTERSTATE TRUCKING, INC.,
Appellant-Intervenor-Plaintiff,

v.

INDIANA STATE DEPARTMENT OF REVENUE,
Appellee-Defendant.

No. 41A01-9012-CV-506.

Court of Appeals of Indiana,
First District.

June 26, 1991.

Trucking company brought class action against Department of Revenue contending that Department improperly assessed motor carrier fuel tax to extent trucking company's dump trucks used fuel in common fuel reservoir to operate mechanism which raised and lowered beds of trucks, as well as to move them along highway. Carrier filed motion to intervene, alleging that some of its fuel was used to traverse toll roads instead of public highways. The Johnson Circuit Court, Jeffrey C. Eggers, J., denied motion, and carrier appealed. The Court of Appeals, Baker, J., held that: (1) toll roads were "highways" within meaning of motor carrier fuel tax statutes, and (2) carrier did not use its fuel for locomotion along highway and for "another commercial purpose," and thus did not come within definition of class.

Affirmed.

Carrier that used some of its motor fuel to traverse toll roads did not come within class of carriers operating equipment having common fuel reservoir for locomotion

along highway and for "another commercial purpose," in action for refund of motor carrier fuel tax attributable to other commercial purpose, given determination that toll road was "highway" within meaning of motor carrier fuel tax statutes. West's A.I.C. 6-6-4.1-1 et seq.

James H. Hanson, Lynne D. Lidke, Michael J. Tosick, Scopelitis, Garvin, Light & Hanson, Indianapolis, Tom G. Jones, Jones, Loveall & Johnson, Franklin, for appellant-intervenor-plaintiff.

Kevin Charles Murray, Locke Reynolds Boyd & Weisell, Indianapolis, for appellee-defendant.

BAKER, Judge.

Today we[1] are asked whether a toll road is a highway. We determine that it is. The question arises out of Area Interstate Trucking, Inc.'s (Area) appeal from the trial court's final judgment denying Area's motion to intervene in a class action against the Indiana State Department of Revenue (the Department) to recover improperly assessed motor carrier fuel taxes.

Because we conclude a toll road is a highway, we hold Area was not a class member under the class definition and affirm the trial court's denial of Area's motion to intervene in the class action.

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[1] This action is before this court, instead of before the Indiana Tax Court, because the action was commenced in the Marion Superior Court on June 27, 1986, whereas the Indiana Tax Court did not come into existence until July 1, 1986. *See* IND.CODE § 33-3-5-1.

FACTS

Schwerman Trucking Company (Schwerman) operates dump trucks which have a common fuel reservoir containing the fuel to propel the truck and operate a mechanism which raises and lowers the beds of the dump trucks. On June 27, 1986, Schwerman filed a class action against the Department contending that the Department had improperly assessed the motor carrier fuel tax pursuant to IND.CODE § 6-6-4.1-1 *et seq.* and that Schwerman and the class members were due tax refunds. The trial court approved a stipulation for class certification entered into by Schwerman and the Department which defined the class as follows:

> "That the class is composed of the following taxpayers: each person and/or entity who operates equipment which has a common fuel reservoir for locomotion along the highway and for another commercial purpose and who are subject to the taxes imposed by the Indiana Code, as amended I.C. 6-6-4.1-1, et seq."

Record at 34.

Area filed a motion for the court to recognize a subclass and appoint Area as its representative and a motion to intervene, arguing its claim was like Schwerman's in that some of the fuel used by Area, a carrier, was used to traverse toll roads instead of public highways. Area argued toll roads are not highways and, therefore, the portion of Area's fuel consumed on the toll roads was fuel consumed for another commercial purpose and, in accordance with IND.CODE § 6-6-4.1-1(d), is not subject to the motor carrier fuel tax.

The trial court denied Area's motion to intervene and entered final judgment on the order, after finding that the motion was untimely and raised a question of law and fact not common to Schwerman's dispute with the Department, and that Area's intervention would prejudice settlement between the original parties by causing substantial delay. Area then filed this appeal. Subsequently, Schwerman and the Department filed a settlement agreement with the court acknowledging the agreement would have no effect on Area's claims.

In its order denying Area's motion to intervene, the trial court did not conclude explicitly that Area was not a member of the Schwerman class but restated the definition of the Schwerman class, noted the definition of highway found in IND.CODE § 6-6-4.1-1(f), stated that IND.ADMIN.CODE tit. 45, r. 13-2-11 (1984) indicates a toll road is a highway for the purposes of IND.CODE § 6-6-4.1-1, and found, "Common Sense points to a conclusion that had the Legislature and the Department of State Revenue intended toll road usage to not be highway and to be 'another commercial purpose', specific language to this effect would have been used." Record at 264, Item 7. *See also* Record at 263, Items 3-5.

From the court's findings we may infer that it would find Area is not a class member if it were faced with the issue. Both parties ask us, for the sake of judicial economy, to decide whether Area is a class member. Area contends that its use of fuel upon the Indiana toll road is fuel consumption "for another commercial purpose", just as is Schwerman's auxiliary power equipment fuel usage for the dump bed mechanism. Area argues it is, therefore, a member of the class defined by Schwerman and the

Department. The Department contends a toll road is a highway and, therefore, the sole purpose of the equipment operated by Area is for locomotion along a highway and not for any other commercial purpose. Therefore, the Department concludes, Area was not a class member.

DISCUSSION AND DECISION

Both Area and the Department agree the key issue in this case is the meaning and scope of the class definition stipulated to by Schwerman and the Department.[2] Specifically, the question is whether Area's claim for refunds of taxes paid on fuel used for transportation on a toll road brings it within the definition of class membership. On appeal, Area concedes that if it is not a class member there is no question of whether Schwerman was representing Area adequately and Area is not entitled to intervene.

As the appellant, Area has the burden of demonstrating reversible error. The trial court's judgment is clothed with a presumption that it is correct. *Indiana Dept. of Revenue v. Waterfield Mortgage Co.* (1980), Ind.App., 400 N.E.2d 212, 214.

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[2] Area initially raised as additional issues on appeal the trial court's findings that Area's motion to intervene was untimely, concerned questions not common with the disputes between Schwerman and the Department, and would prejudice settlement of the class claims. In its reply brief, however, Area abandons those issues. We agree with the parties that an answer to the question regarding Area's class membership is dispositive. Therefore, we do not address the additional issues raised by Area.

Our goal in construing statutes and regulations is to seek out and give effect to the intent of our legislature. *Superior Construction Co. v. Carr* (1990), Ind., 564 N.E.2d 281, 284; *Hamilton County Dept. of Public Welfare v. Smith* (1991), Ind.App., 567 N.E.2d 165, 169. In attempting to determine legislative intent, we give considerable deference to an interpretation of a statute by an administrative agency charged with administering the statute. *Indiana State Prison and State Employees' Appeals Commission v. Van Ulzen* (1991), Ind.App., 567 N.E.2d 1164, 1167; *Dept. of Revenue v. United States Steel Corp.* (1981), Ind.App., 425 N.E.2d 659, 666. Furthermore, "a long adhered to administrative interpretation dating from the legislative enactment, with no subsequent change having been made in the statute involved, raises a presumption of legislative acquiescence which is strongly persuasive upon the courts." *Baker v. Compton* (1965), 247 Ind. 39, 42, 211 N.E.2d 162, 164.

A carrier, meaning a "person who operates or causes to be operated a commercial motor vehicle on any highway in Indiana", IND.CODE § 6-6-4.1-1(a), is charged with paying the motor fuel tax quarterly to the Department, IND.CODE §§ 6-6-4.1-4(a); 6-6-4.1-1(e) which is charged, under IND.CODE § 6-6-4.1-5(a), with depositing revenue collected from the motor fuel tax into the state highway fund. Thus, the Department is charged with administering the motor carrier fuel tax and we will pay great deference to its interpretation of IND.CODE § 6-6-4.1-1 *et seq.*

By the authority provided it in IND.CODE § 6-8.1-3-3, the Department adopted the rules in IND.ADMIN.CODE tit. 45, r. 13-1-11 (1984) on July 13,

1984. Those rules provide: "(a) The term 'highway' shall mean the entire width between the boundary lines of every thoroughfare that is open in any part to the use of the public for purposes of vehicular travel. (b) For purposes of IC 6-6-4.1-1, a toll road is a highway." No legislative change has been made that would indicate the legislature placed a different interpretation on IND.CODE § 6-6-4.1-1 since July 13, 1984. We give substantial weight both to the Department's interpretation of its own regulations and to the legislature's acquiescence in the administrative interpretation.

Although the doctrine of "legislative acquiescence is a useful tool of statutory construction, it is not a sufficient independent basis for affirming a judgment." *Indiana Department of State Revenue v. Mercantile Mortgage Co.* (1980), Ind.App., 412 N.E.2d 1252, 1253. Therefore, we will independently construe the term "highway" as used in IND.CODE § 6-6-4.1-1 in accordance with the usual rules of statutory construction.

"Statutes which impose or levy taxes may not be extended beyond the clear import of the language of the statute. Such statutes are to be construed strictly against the state and in favor of the taxpayer." *Wechter v. Indiana Department of State Revenue* (1989), Ind.Tax, 544 N.E.2d 221, 224, *aff'd* (1990), Ind., 553 N.E.2d 844. Nevertheless, in interpreting a statute we give the words used their ordinary and common meaning rather than "overemphasizing a strict literal or selective reading of individual words." *Spaulding v. International Bakers Services, Inc.* (1990), Ind., 550 N.E.2d 307, 309. We presume the legislature intended the ordinary meaning of the statutory language to apply unless such a presumption

"would manifestly defeat the object of the provisions." *Dept. of Revenue v. United States Steel, supra,* 425 N.E.2d at 665. The plain and ordinary meaning of words is the "meaning given to the language by the community and ordinary reader." *Romain v. A. Howard Wholesale Co.* (1987), Ind.App., 506 N.E.2d 1124, 1126.

IND.CODE § 6-6-4.1-1(f) defines a "highway" as "[T]he entire width between the boundary lines of every publicly maintained way that is open in any part to the use of the public for purposes of vehicular travel." In common usage, a "highway" is "1a: a road or way on land or water that is open to public use as a matter of right whether or not a thoroughfare; a public road or way including the right-of-way . . . c: a main direct road (as between one town or city and another) . . . " *Webster's Third New International Dictionary (Unabridged)* 1069 (1967).

A "toll road" is "a road for the use of which a toll is collected". *Id.* at 2405. As our supreme court stated, "Roads and highways are generic terms, embracing all kinds of public ways, such as county and township roads, streets, alleys, township and plank roads, *turnpike* or gravel roads, . . . " *Strange v. Board* (1910), 173 Ind. 640, 652, 91 N.E. 242, 247 (emphasis added). A "turnpike road" is "a: a toll road; esp.: a toll expressway . . . c: a main road; a paved highway having a crowned surface". *Webster's Third New International Dictionary (Unabridged)* at 2469. As we stated in *Southern Indiana Gas v. Dept. of Highways* (1989), Ind.App., 533 N.E.2d 1289, *trans. denied,* "All roads laid out under legislative enactment are public highways belonging to the State." *Id.* at 1293.

In accordance with these definitions, we hold that the plain and ordinary meaning of a toll road or turnpike is

that it is a highway as that term is defined in IND.CODE § 6-6-4.1-1(f). We have no reason to think that such a meaning for toll road would manifestly defeat the legislature's objective for the motor carrier fuel tax provisions. We, therefore, reject Area's arguments that: (1) a toll road is not a highway because the motor carrier fuel tax revenues are deposited into a state highway fund which allegedly is not used to support the toll road, *see* IND.CODE §§ 6-6-4.1-5; I.C. § 8-2.1-23-1; I.C. § 8-14-1-2; I.C. § 8-14-1-3; I.C. 8-23-9-55, and (2) a toll road is not "open", as the term is used to define "highway" in I.C. § 6-6-4.1-1(f), because access is gained by payment of a toll and is hampered by restrictions.

We repeat that the definition of class membership is an "entity who operates equipment which has a common fuel reservoir for locomotion along the highway and for another commercial purpose". Record at 34. Thus, the class definition requires both that an entity be using its fuel for locomotion along the highway and for another commercial purpose. We have determined that a toll road is a highway. Therefore, toll road use does not constitute "another commercial purpose". Because Area was using its common fuel reservoir solely for locomotion along a highway, and not for another commercial purpose, Area was not a class member. Consequently, as Area concedes, it is not entitled to intervene in Schwerman's action. The trial court did not err in denying Area the right to intervene as a class member in Schwerman's action against the Department.

Affirmed.

RATLIFF, C.J., and BARTEAU, J., concur.

APPENDIX M

IN THE INDIANA TAX COURT

CASE NO. 49T10-9105-TA-00022

AREA INTERSTATE TRUCKING, INC., INDIANA MATERIAL TRANSFER, Inc., ADVANCE TRANSPORTATION COMPANY, BRYAN TRUCK LINE, INC., CHURCHILL TRUCK LINES, INC., FRANKS & SON, INC., GREAT AMERICAN LINES, INC., KAT, INC. and MOGLE ENTERPRISES, INC., on behalf of themselves and all others similarly situated,

Petitioners,

vs.

INDIANA DEPARTMENT OF REVENUE and KENNETH L. MILLER, as Acting Commissioner of the Indiana Department of Revenue,

Respondents.

ORDER

(Filed Dec. 29, 1992)

This matter is before the Court on the Withdrawal of Motion for Determination of Class and Praecipe for Hearing filed by Petitioners.

The Court, being first duly advised in the premises, now finds that permission to withdraw the Motion for

Determination of Class and Praecipe for Hearing should be granted.

IT IS THEREFORE ORDERED that Petitioners are granted permission to withdraw their Motion for Determination of Class and Praecipe for Hearing at this time, subject to a right to re-file the Motion for Determination of Class and Praecipe for Hearing at a later date.

Dated: December 29, 1992

/s/ Thomas G. Fisher
Thomas G. Fisher, Judge
Indiana Tax Court

COPIES TO:

James H. Hanson
Michael J. Tosick
SCOPELITIS, GARVIN, LIGHT & HANSON
1777 Market Tower
10 West Market Street
Indianapolis, IN 46204

Richard A. Huser
Kevin Charles Murray
LOCKE REYNOLDS BOYD & WEISELL
1000 Capital Center South
201 North Illinois Street
Indianapolis, IN 46204

No. 93-106

IN THE SUPREME COURT OF
THE UNITED STATES
October Term, 1993

AREA INTERSTATE TRUCKING, INC.
INDIANA MATERIAL TRANSFER, INC.
ADVANCE TRANSPORTATION COMPANY,
BRYAN TRUCK LINE, INC., CHURCHILL
TRUCK LINES, INC., FRANKS & SON, INC.,
GREAT AMERICAN LINES, INC., KAT, INC.
and MOGLE ENTERPRISES, INC. on behalf
of themselves and all others
similarly situated, Petitioners,

v.

INDIANA DEPARTMENT OF REVENUE and
KENNETH L. MILLER, as Acting
Commissioner of the Indiana
Department of Revenue, Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE INDIANA TAX COURT

REPLY TO BRIEF IN OPPOSITION

James H. Hanson
Counsel of Record for Petitioners
Scopelitis, Garvin, Light & Hanson
10 West Market Street, Suite 1777
Indianapolis, IN 46204
(317) 637-1777

Michael J. Tosick
Lynne D. Lidke
Co-Counsel for Petitioners

September 14, 1993

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No. 93-106

IN THE SUPREME COURT OF
THE UNITED STATES
October Term, 1993

AREA INTERSTATE TRUCKING, INC.
INDIANA MATERIAL TRANSFER, INC.
ADVANCE TRANSPORTATION COMPANY,
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TRUCK LINES, INC., FRANKS & SON, INC.,
GREAT AMERICAN LINES, INC., KAT, INC.
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INDIANA DEPARTMENT OF REVENUE and
KENNETH L. MILLER, as Acting
Commissioner of the Indiana
Department of Revenue, Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE INDIANA TAX COURT

REPLY TO BRIEF IN OPPOSITION

Petitioners, Area Interstate Trucking, Inc., Indiana Material Transfer, Inc., Advance Transportation Company, Bryan Truck Line, Inc., Churchill Truck Lines, Inc., Franks & Son, Inc., Great American Lines, Inc., KAT, Inc. and Mogle Enterprises, Inc., on behalf of themselves and all others similarly situated, respectfully submit this Reply to Brief in Opposition and thereby reiterate their

request for a writ of certiorari on the important federal question erroneously decided by the Indiana Tax Court in this case.[1]

I.

REPLY TO RESPONDENTS' ARGUMENT IN OPPOSITION

A.

Petitioners Do Not Challenge The Indiana Tax Court's "Construction" Of The Motor Carrier Fuel Tax

Respondents erroneously contend that the Petition for Writ of Certiorari requests this Court to encroach upon the function of the Indiana Tax Court in its construction of Indiana's Motor Carrier Fuel Tax laws. Petitioners do not in fact seek such "construction" of the Motor Carrier Fuel Tax. Instead, Petitioners appropriately request an analysis of the equal protection challenge raised in this case, and this Court, as the final arbiter of Petitioners' constitutional rights, undoubtedly has jurisdiction to overturn the Indiana Tax Court's opinion.

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[1] Respondents, in their Brief in Opposition, correctly state that the writ of certiorari should be directed to the Indiana Tax Court, not the Supreme Court of Indiana as indicated in the Petition for Writ of Certiorari, because the Indiana Tax Court is the highest appellate court in Indiana that ruled on the merits of Petitioners' case. The Office of the Clerk, pursuant to a telephone conversation dated July 21, 1993, advised Petitioners of this error in the form of their papers, but also advised Petitioners that correction of such form was unnecessary. In addition, Petitioners acknowledge that the final judgment entry of the Indiana Tax Court was inadvertently omitted from the Appendix of the Petition for Writ of Certiorari. A copy of that final judgment entry made on January 26, 1993 was forwarded to the Office of the Clerk under letter dated July 26, 1993 and is included in Respondents' Supplemental Appendix at 1. Petitioners know of no authority suggesting that such errors in form are jurisdictional, *Cf.* Sup. Ct. Rule 33.7, but nevertheless regret and apologize to the Court for their oversights.

In the proceedings below, Petitioners raised two basic contentions in their challenge to the Motor Carrier Fuel Tax. First, Petitioners argued that the Indiana Toll Road is not a "highway" as defined by Indiana statute and that, as a result, vehicular consumption of fuel in toll road operations is not a taxable event under Ind. Code Ann. §§ 6-6-4.1-4(a); -4.5(a) (West Supp. 1992) (taxing "the consumption of motor fuel by a carrier in its operations on highways in Indiana") (emphasis supplied). That contention, which sought a basic construction of Indiana's Motor Carrier Fuel Tax laws "in the sense of defining the meaning of a particular statutory word or phrase," *Wisconsin v. Mitchell*, 113 S.Ct. 2194, 1298 (1993), was rejected by the Indiana Tax Court. *Area Interstate Trucking, Inc. v. Indiana Department of State Revenue*, Ind. Tax Court, 605 N.E.2d 272, 275 (1992) (following *Area Interstate Trucking, Inc. v. Indiana State Department of Revenue*, Ind.App., 574 N.E.2d 311 (1991), *trans. denied*). Petitioners do not agree with the Indiana Tax Court's interpretation of the statutory term "highway" under Indiana law, but they do not challenge that construction by way of their Petition for Writ of Certiorari.

Instead, Petitioners seek review of the second and alternative contention advanced in the arguments below, which concedes that the Indiana Toll Road is a "highway," but then asserts that Indiana law, as applied to Petitioners, violates their right to equal protection under the U.S. Constitution. Furthermore, Petitioners do not improperly seek "construction" of state law in asking this Court to evaluate and reject the Indiana Tax Court's erroneous conclusions concerning the purpose and impact of the Motor Carrier Fuel Tax. Rather, such an analysis is a necessary ingredient to the equal protection review sought because, in any equal protection case, it is the allegedly "legitimate state purpose" and its rational connection to the distinctions drawn in legislative classifications that determine whether equal protection principles are violated. Thus, in both *Hooper v. Bernilillo County Assessor*, 472 U.S. 612 (1985) and *Williams v. Vermont*, 472 U.S. 14 (1985), for example, this Court engaged in extensive review of the purported purposes of state taxation schemes in order to determine whether those purposes justified the legislative classifications challenged by the taxpayers.

Accordingly, Respondents beg the question in their argument that this Court is constrained to accept the Indiana Tax Court's conclusion that the purpose of the Motor Carrier Fuel Tax is "simply to charge motor carriers for the use of the public roads in Indiana." *Area Interstate Trucking, supra* at 277. The properly-framed question presented by the Petition for Writ of Certiorari is as follows: If the only purpose of the Motor Carrier Fuel Tax is to charge for use of public roads, why are all taxpayers except Petitioners permitted to pay tax only when and to the actual extent they use tax-supported roads, and how does that purpose rationally support the taxation of Petitioners' toll road fuel consumption when no other taxpayer is denied the benefits of such proportionate taxation? If in answering that question this Court would be engaging in improper construction of state law, as Respondents argue, the taxation schemes struck down in *Hooper, supra*, *Williams, supra*, and other decisions of this Court would not have been subject to the Court's equal protection review in the first instance. Respondents' suggestion to the contrary is unconvincing.

B.

The Entire Decision In *Carmichael v. Southern Coal & Coke Co.*[2] Is Controlling

Respondents selectively read only portions of this Court's 1936 opinion in *Carmichael, supra*. Certainly, *Carmichael* stands for the general rule that a state tax need not be imposed in proportion to the benefits taxpayers derive from its expenditure or in proportion to the burdens the taxed activity imposes upon the state. 301 U.S. at 521-23. However, *Carmichael* also stands for the following plainly-stated proposition:

> A different question is presented when a state undertakes to levy local assessments apportioned to local benefits. In

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[2] 301 U.S. 495 (1936).

> that case, if it fails to conform to the standard of apportionment adopted, its action is arbitrary, because there is a denial of equal protection.

Id. at 523, n. 15 (emphasis supplied). Petitioners contend that the entire *Carmichael* decision, including its proposition in footnote 15, is controlling in this litigation because the question presented is not whether Indiana must adopt a proportionate tax for the support of its roads. That question, if asked, would be answered in the negative by the general rule set forth in *Carmichael*, but it is a nonsequitur in this case. Respondents have already adopted and applied the Motor Carrier Fuel Tax proportionately, without compulsion to do so, and thus the "different question" posed in *Carmichael's* footnote 15 is the issue in this litigation.

Respondents argue that the "different question" posed in *Carmichael* is inapplicable to this case because the decisions cited in footnote 15 involved property tax assessments. *See Georgia Ry. & Electric Co. v. City of Decatur*, 295 U.S. 165 (1935); *Road Improvement District No. 1 v. Missouri Pacific R.R.*, 274 U.S. 188 (1927). The very fact that *Carmichael* cites those decisions, however, directly contradicts Respondents' position because the tax under review in *Carmichael* did not involve a property tax assessment, but rather a business tax imposed for purposes of funding a workers' compensation benefit plan. Thus, the proposition set forth in footnote 15 of *Carmichael* is just as applicable to this case as it was to the *Carmichael* analysis.

That basic proposition is as follows: Once a state undertakes the task of proportionate taxation, it must apply the standard of apportionment even-handedly and in a fashion consistent with the Equal Protection Clause of the Fourteenth Amendment. Respondents' citation to *Carmichael* for only those portions of the opinion that support their position is unpersuasive, and Petitioners urge this Court not to read *Carmichael* so selectively.

C.

The Motor Carrier Fuel Tax Is Proportionately Applied To All Taxpayers Except Petitioners

Respondents insist that the Motor Carrier Fuel Tax is not a proportionate tax unfairly applied to Petitioners because "[t]he benefits derived from the tax need not be, and in this instance are not, apportioned to the burdens of the taxpayer." *Brief in Opposition* at 11. Thus, Respondents employ a superficial theme in their attempt to avoid the important equal protection issue at hand, adopting the Indiana Tax Court's position that the Motor Carrier Fuel tax is not a proportionate tax and therefore need not be applied proportionately to Petitioners. As shown below, however, Respondents' repeated statements to that effect do not make it so.

First, Respondents attempt to prove their proposition as to the allegedly non-proportionate nature of the tax by pointing to the legislature's decision to tax toll road fuel consumption as "highway" fuel consumption. Respondents then erroneously state that other consumers of fuel not subject to taxation,[3] unlike Petitioners, "are not providing ... transportation services in operations upon Indiana public roads." *Brief in Opposition* at 11-12. What Respondents ignore, however, is the undisputed evidence in this case that many auxiliary power equipment operators do in fact engage in vehicular operations upon Indiana roads while the auxiliary power equipment is consuming fuel but are taxed only on their vehicular use of those roads. Respondents therefore attempt to create "pre-existing differences" where none exist. *See Williams, supra* at 27. There are in reality no differences between

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[3] As previously reviewed, there has been a systematic carving out of "exemptions" to the Motor Carrier Fuel Tax over time. In its current evolutionary state, the tax is not applied to the vehicular consumption of fuel on out-of-state roads or on in-state private roads. Similarly, the tax is not applied to fuel consumed in the operation of auxiliary power equipment, such as, for example, the device that turns the drum on a ready-mix concrete truck as it moves along the roadway. *See Petition for Writ of Certiorari* at 5-6.

Petitioners and out-of-state road users, private road users, and auxiliary power equipment operators because, even though they may have other taxable fuel uses, their consumption of fuel in non-taxable activity does not "consume" or burden the roadway system supported by the tax. Thus, despite Respondents' contentions to the contrary, the fact remains that Petitioners are the only taxpayers denied proportionate taxation under Indiana's Motor Carrier Fuel Tax laws.

Second, Respondents argue that the tax is not truly proportionate in nature because Petitioners have failed to prove that every street, alley, and roadway in Indiana actually receives Motor Carrier Fuel Tax monies for its support. Petitioners need prove no such thing. What they have proven is that all of those streets and alleys in Indiana are eligible for Motor Carrier Fuel Tax support, but the Indiana Toll Road, in contradistinction, is the only public road that is not eligible for such support. In this regard, Petitioners do not challenge the legislature's decision not to fund the Indiana Toll Road with Motor Carrier Fuel Tax monies. Instead, what Petitioners challenge is taxation of toll road fuel consumption when every other taxpayer in the State of Indiana is afforded the benefits of a proportionate taxation scheme that imposes tax only when and to the actual extent the taxpayer uses the roadway system supported by the tax. Differently stated, it is not the use of tax dollars that is in question; rather, it is the assessment of those tax dollars that Petitioners challenge because the method of assessment for the Motor Carrier Fuel Tax arbitrarily excludes Petitioners from a proportionate taxation system under which all other taxpayers pay the same 27¢ per gallon for their vehicular use of the roadway system supported by the tax.

Finally, Respondents assert that taxation of toll road fuel consumption is justified by "indirect benefits" received by the Indiana Toll Road, relying upon an opinion rendered by the Supreme Court of New Jersey in *Safeway Trails, Inc. v. Furman*, 41 N.J. 467, 197 A.2d 366 (1964), *appeal dismissed, cert. denied*, 379 U.S. 14 (1964). Respondents decline to acknowledge, however, that the Indiana Toll Road cannot lawfully partake of the type of "indirect benefits" Respondents attempted to prove in the proceedings below because, under Ind. Code Ann.

§ 8-9.5-8-6(c)(4) (West Supp. 1992), the Indiana Toll Road must be self-supported and managed separate and apart from other all other Indiana roadways. *See also* Ind. Code Ann. §§ 8-9.5-8-7; -8 (West Supp. 1992). Thus, such an "indirect benefit" analysis was never relied upon by the Indiana Tax Court as a justification for taxation of toll road fuel consumption and should similarly play no part in this Court's review, particularly in light of the questionable authority cited by Respondents.[4]

In short, Respondents are unconvincing in their assertion that the Motor Carrier Fuel Tax is not proportionately applied. The Motor Carrier Fuel Tax is in fact a proportionately-applied tax except as applied to Petitioners. That is the complaint in this case, that is the basis for Petitioners' equal protection challenge, and that is the critical point of Petitioners' argument that was never meaningfully addressed by the Indiana Tax Court. Under *Carmichael, supra*, and the rational-basis scrutiny applicable to tax cases, Petitioners' challenge to the Motor Carrier Fuel Tax should be sustained.

D.

Petitioners Do Not Request That Rational-Basis Scrutiny Be Abandoned

Respondents are incorrect in their assertion that Petitioners request abandonment of the rational-basis scrutiny traditionally applied by this Court in equal protection challenges to state taxation schemes. What the Petition for Writ of Certiorari makes plain is Petitioners' contention that rational-basis scrutiny requires more thoughtful review than that afforded by the lower Indiana

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[4] In this regard, the vast majority of the *Safeway Trails* decision is devoted to a Commerce Clause analysis, not an equal protection review, and, to the extent any of the New Jersey court's Commerce Clause analysis relates in any way to the equal protection claim advanced in this case, the analysis is suspect under the landmark U.S. Supreme Court decision in *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987).

courts and that, even under rational-basis scrutiny, modern-day systems of taxation like the Motor Carrier Fuel Tax scheme cannot be justified by superficial, talismanic analysis.

The Petition for Writ of Certiorari properly presents to this Court an opportunity to clarify to lower courts just how rational-basis scrutiny should be applied to complex taxation schemes that, necessarily, become more susceptible to abuse and misunderstanding as they become more finely-tuned in their purpose, their mechanisms for taxation, and their impact upon taxpayers. While the Court's review in complex tax cases is properly "deferential," it nevertheless still requires meaningful consideration of the "plausible policy reason" for a legislative classification that treats similarly-situated taxpayers differently. *Nordlinger v. Hahn*, 112 S.Ct. 2326, 2332 (1992). Otherwise, rational-basis scrutiny affords taxpayers virtually no relief from discriminatory and arbitrary taxation schemes that violate the basic equal protection principles long ago established by this Court. Petitioners seek a reiteration of those basic principles and are confident that, when those principles are properly applied to the facts of this case, they will prevail in their contention that the Motor Carrier Fuel Tax laws of Indiana violate their right to equal protection. Petitioners do not need "heightened" scrutiny as Respondents suggest in order to achieve that result. What is needed is a mandate to lower courts that, when a legislative classification is "[s]tripped of its asserted justifications," *Hooper, supra* at 622, and therefore cannot be rationally justified by its alleged purpose, equal protection concerns are violated. Such a showing has been made in this case and thus calls upon the Court to issue a writ of certiorari.

II.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

James H. Hanson
Counsel of Record for Petitioners
Scopelitis, Garvin, Light & Hanson
10 West Market Street, Suite 1777
Indianapolis, IN 46204
(317) 637-1777

Michael J. Tosick
Lynne D. Lidke
Co-Counsel for Petitioners

September 14, 1993